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The "Unfairness Doctrine" — Balance and Response Over the Airwaves

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Introduction

THE SO-CALLED "fairness doctrine" requires television and radio licensees to do two things. Part one of the doctrine obligates broadcast licensees to devote a reasonable percentage of their programming to controversial issues of public importance. Part two of the doctrine mandates that contrasting viewpoints be aired when such issues are covered.¹

Under the doctrine, licensees are judged by a reasonableness, good faith standard, and are given wide discretion. As long as a licensee's

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1. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 377 (1969); Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1257-58, par. 21 (1949) [hereinafter cited as *Editorializing Report*]; Fairness Doctrine and Public Interest Standards, Fairness Report Regarding Handling of Public Issues, 39 Fed. Reg. 26,372, 26,374, par. 15 (1974) [hereinafter cited as *1974 Fairness Report*]; The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, Reconsideration of the Fairness Report, 58 F.C.C.2d 691, 693, par. 10 (1976) [hereinafter cited as *Fairness Report Reconsideration*]. The personal attack and political editorial rules, sub-categories of the fairness doctrine, will not be the focus of this article. Under those rules, licensees are required to take specific steps to insure a reply by individuals attacked during discussion of a controversial issue of public importance (in non-exempt programming) or by a non-favored candidate(s) if a licensee endorses or opposes a political candidate. For a look at the rules see 47 C.F.R. §§73.123(a)-(b) (1976) (AM radio), 73.300(a)-(b) (1976) (FM radio), 76.679(a)-(b) (1976) (TV stations), 76.209(b)-(c) (1976) (origination cablecasting over cable TV systems). For more on the author's viewpoint on these rules see Simmons, *The FCC's Personal Attack and Political Editorial Rules Reconsidered*, 125 U. PA. L. REV. 990 (1977).

judgment on a fairness doctrine matter is not unreasonable or in bad faith he has not violated his responsibilities.²

The development of the doctrine was based on noble objectives. It was predicated upon the asserted scarcity of the airwave resource, on public ownership of that resource, and on the federal government's award of an airwave frequency to a licensee relatively free of charge. The doctrine was an attempt to ensure that the American public receive a supply of diverse information on important public issues essential to democratic government, that broadcasters do not selfishly use their powerful monopoly positions to further only their own views, and that various parties have access, in a general way, to the airwaves to communicate their differing points of view.³

Despite these noble objectives the doctrine has taken on an "unfairness" quality. Because of the competing interests it must resolve and the way it has been administered, the doctrine has been unfair to the public, to broadcasters, to parties seeking access to the media, and ironically, to the FCC itself.

Three critical questions that have been at the center of fairness doctrine activity are: (1) What issue has been raised in a broadcast which may require response under part two of the doctrine; (2) Is that issue "controversial and of public importance"; and (3) What issues must be covered under part one of the doctrine? The difficulties encountered in resolving these important questions have been discussed at length by the author elsewhere, and will not be repeated here.⁴

But suppose these questions have been resolved. Suppose, in the typical part two case,⁵ the issue has been specified and the licensee

2. 1974 Fairness Report, *supra* note 1, at 26,375, par. 21. For key policy documents on the fairness doctrine outlining its requirements, see note 1 and authorities cited therein, *supra*. See also, Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10,415, 1964) [hereinafter cited as Fairness Primer]; and Broadcast Procedure Manual, 39 Fed. Reg. 32,290 (1974) (rev. ed.) [hereinafter cited as Broadcast Procedure Manual]. The general fairness doctrine and the personal attack rules are applicable to cable television system operators who originate programming they exclusively control. 47 C.F.R. §§ 76,209, 76,205 (1976). The FCC recently considered a proposed rule that would have allowed cable systems to substitute use of their access facilities for compliance with the fairness doctrine and equal time obligations. The proposal was tabled indefinitely. See BROADCASTING, Sept. 27, 1976, at 7 and Oct. 4, 1976, at 5.

3. For a discussion of these purposes, see *supra* note 1 and authorities cited therein. For a review of the yearly development of the fairness doctrine and its objectives, see Simmons, *Fairness Doctrine: The Early History*, 29 FED. COM. B.J. 207 (1976).

4. See Simmons, *The Problems of "Issue" in the Administration of the Fairness Doctrine*, 65 CALIF. L. REV. 546 (1977).

5. Only a handful of fairness doctrine cases decided by the FCC involve part one of the doctrine. Almost all cases focus on part two, the balancing part.

has determined it is a controversial issue of public importance. What must a licensee do to ensure presentation of contrasting viewpoints on the issue? When are his efforts in this regard considered reasonable by the Federal Communications Commission?

In the following pages these questions will be confronted. The Federal Communications Commission case law and policy guidelines for determining which contrasting viewpoints and spokesmen must be aired will first be critically analyzed. Problems involved in Federal Communications Commission decisions on how licensees are to balance formats, total time, frequency of broadcast, and time of day between contrasting speakers' presentations will be explored next. The administrative problems involved in trying to deal with balance problems, including stopwatch and elapse time concerns, and cases illustrating how administration of licensees' balance obligations may be counter-productive and harmful to the public interest, will then be addressed. The next two sections focus on the Commission's less-than-vigorous enforcement record and the potential for abuse of any enforcement under the doctrine as it presently exists. The article concludes with an examination of how the doctrine has resulted in unfairness, and a proposal for change that will mitigate many of the doctrine's detrimental effects.

I. Overall Programming

A critically important concept, and one that is often overlooked by fairness doctrine complainants, is that the licensee's fairness is ordinarily judged on the basis of his overall programming, not on any one show.⁶ A single documentary or a particular editorial may be totally biased towards one point of view on an issue. This does not amount to a violation of the fairness doctrine if, in other programming, the licensee has presented a reasonable balance of contrasting viewpoints. The Federal Communications Commission insists that fairness complainants substantiate that contrasting viewpoints have not been presented in a licensee's total programming.⁷

6. See Editorializing Report, *supra* note 1, at 1250, par. 8, 1255, par. 18, and 1974 Fairness Report, *supra* note 1, at 26,377, par. 36. However, if a licensee has not presented any prior programming on the issue involved and declares he will not present any in the future, then the FCC will judge the licensee only on the initial broadcast. Fairness Report Reconsideration, *supra* note 1, at 695 n.5. In this situation the initial broadcast would constitute the licensee's "overall programming" on the issue. It is possible to attain reasonable balance within the confines of a single show. For example, a panel discussion may present speakers who advocate different points of view; a news story may cover contrasting sides; a documentary may contain interviews with advocates from both ends of the spectrum.

7. Broadcast Procedure Manual, *supra* note 2, at 32,290, par. 14.

The licensee cannot avoid his overall balancing obligation by pointing a finger at the networks. Even if an initial biased viewpoint was presented on a network program, it is the licensee's ultimate responsibility to ensure balance.⁸ The Federal Communications Commission's determinations on how to ensure balance, however, are typically vague, inconsistent, and at times ill-advised.

II. *The Contrasting Viewpoint*

If one side of a controversial public issue has been aired, the licensee must determine which contrasting viewpoint is to be presented. Although the Federal Communications Commission sensibly declared in its 1974 Fairness Report that for many issues a variety of contrasting viewpoints may need broadcast coverage,⁹ it has never found a licensee unreasonable for presenting only two viewpoints.¹⁰ In fact, the Commission has reinforced the "two viewpoint" perspective by frequently referring to the licensee's obligation to present "both" sides of issues¹¹

8. Editorializing Report, *supra* note 1, at 1248. However, the licensee can rely on network programming to present contrasting viewpoints to those initially presented on a locally- or network-originated show. If the network does not present such contrasting viewpoints, the licensee is responsible for seeing that they are aired. Capitol Broadcasting Co., 40 F.C.C. 615 (1964). Networks, through their ownership of up to five local stations, have also been considered subject to the fairness doctrine and "where a complaint is based on a network program and . . . addressed to a network organization . . . the Commission . . . has always accepted this approach as a basis for issuance of a ruling on the matter." Senator Eugene McCarthy, 11 F.C.C.2d 511 n.9 (1968).

9. 1974 Fairness Report, *supra* note 1, at 26,377, par. 38. However, the Commission later diluted this declaration by stating that [i]n many, or perhaps most, cases it may be possible to find that only two viewpoints are significant enough to warrant broadcast coverage." *Id.*

10. However, in its 1974 Fairness Report the Commission did specifically indicate that a "particular issue may involve more than two opposing viewpoints." 1974 Fairness Report, *supra* note 1, at 26,377, par. 38. The Commission then cited the following language from a law journal: "A principal purpose of the fairness doctrine is to educate the public on the major alternatives available to it in making social choices Acknowledging that there is a 'spectrum' of opinion on many issues, it is nonetheless true that there are often clearly definable 'colors' in the spectrum, even though the points at which they blend into one another may be unclear. The controversy concerning American policy in Indochina is illustrative. The alternatives [prior to America's withdrawal from the war] include[d] increasing military activity, maintaining the [then] present level of commitment, a phased withdrawal and an immediate withdrawal. It might be argued that any licensee who does not present some coverage of at least these views has failed to educate the public about the major policy alternatives available." Note, *The F.C.C. Fairness Doctrine and Informed Social Choice*, 8 HARV. J. LEGIS. 333, 351-52 (1971), cited in 1974 Fairness Report, *supra* note 1, at 26,377 n.15. However, the FCC has not enforced this multi-dimensional viewpoint concept.

11. See, e.g., Democratic National Committee, 25 F.C.C.2d 437, 442 (1970). ("[T]he licensee must afford reasonable opportunity for discussion of *both* sides" [emphasis added]).

instead of "contrasting sides."¹² Given the complexity of many controversial issues of public importance, and the obvious truth of the 1974 Fairness Report's declaration, the FCC's reinforcement of a licensee's bipolar orientation appears antithetical to the doctrine's stated objective of informing the American public.

In outlining which contrasting viewpoints must be aired, the FCC has clearly stressed only "major viewpoints and shades of opinion."¹³ Although the FCC has declared that a licensee cannot keep a viewpoint off the air simply because he disagrees with it,¹⁴ the Commission will not require the "coverage of every possible viewpoint or shade of opinion regardless of its significance."¹⁵ In deciding which shades of opinion are to be presented in a reply broadcast, licensees are to look to the standard utilized in determining which political parties or candidates are to be covered under the fairness doctrine. That standard, as set forth in *Lawrence M.C. Smith*,¹⁶ in the vaguest of terms calls for "a good faith judgment" as to whether there is a need or interest in the community in hearing the candidate or party, and if so, the extent of that need. The enforcement effect of the standard was demonstrated in 1972 when Dr. Benjamin Spock, who was nominated as a presidential candidate at a national convention by the People's Party, and on the ballot in ten states, attempted to get air time via a fairness complaint to the Federal Communications Commission. Despite the fact

12. And where licensees have presented various viewpoints, complainants who have attempted to get additional viewpoints aired have been met with the admonition that the "fairness doctrine does not require a licensee to provide an opportunity for the presentation of every viewpoint on an issue." Horace P. Rowley III, 39 F.C.C.2d 437, 442 (Bur. 1973) (rejecting complainants' claims that the "moderate viewpoint" on the Vietnam War and other "responsible viewpoints" on bias in television news should be broadcast). See also Sidney Willens and Russell Millin, 33 F.C.C.2d 304 (1972) (rejecting complainants' claim that the "third point of view" on particular criminal cases and the roles of various public offices in fight against crime should be broadcast); and Alfred M. Lilienthal, 24 F.C.C.2d 299 (1970) (rejecting complainant's claim that the Jewish-American viewpoint on the Arab-Israeli conflict should be broadcast). The courts have never reversed the FCC for failing to mandate the broadcast of more than two viewpoints, and have reinforced the bipolar orientation by occasionally referring to the licensee's obligation to present "both" sides of an issue.

13. 1974 Fairness Report, *supra* note 1, at 26,377, par. 39.

14. Mrs. J. R. Paul, 26 F.C.C.2d 591 (1969); Editorializing Report, *supra* note 1, at 1249-50. Selection of a reply spokesman is also not to be based on what a licensee believes to be the spokesman's personal motives. Columbia Broadcasting System, 34 F.C.C.2d 773, 777-78 (1972).

15. Fairness Report, *supra* note 1 at 26,377 n.16. The Commission has also stated that licensees must only present "representative community views on controversial issues," Democratic National Committee, 25 F.C.C.2d 216, 224 (emphasis in original), and "responsible positions on matters of sufficient importance to be afforded radio time," Editorializing Report, *supra* note 1, at 1250.

16. 40 F.C.C. 549 (1963).

that Spock was a significant minority candidate,¹⁷ that during the last three critical weeks of the campaign not one of the three national networks gave Spock a second of air time, and that massive coverage had been given to Richard Nixon and George McGovern, the Commission ruled that there was not enough evidence to show a fairness doctrine violation.¹⁸

In essence, the standard gives great discretion to the licensee to determine what contrasting viewpoint is important enough to merit reply time, and reinforcement is provided to the notion that only major opinions need be presented. Non-establishment, minority viewpoints — no matter what their worth — simply do not need airing. And even if there are a number of major “establishment” viewpoints on an issue, the licensee will probably be safe from reprimand if he presents only two.

III. *The Reply Spokesman*

The question of which contrasting viewpoint must be presented is directly linked to the question of how spokesmen are to be selected to present that viewpoint. Licensees cannot simply sit back and follow a policy of not refusing to broadcast reply viewpoints when reply time is demanded. The Commission has stated emphatically that licensees have an obligation to actively and affirmatively encourage the presentation of contrasting viewpoints.¹⁹ In the 1974 Fairness Report²⁰ the Commission reaffirmed its *Cullman* doctrine,²¹ first enunciated in 1963,

17. And what of other candidates who had not mounted such an extensive campaign? See William Sheroff, 30 RAD. REC. 2D 588 (1974); Anthony Bruno, 26 F.C.C.2d 656 (1970); and Richard Kay, 24 F.C.C.2d 426, *aff'd* 433 F.2d 638 (D.C. Cir. 1970).

18. Dr. Benjamin Spock Peoples Party, 38 F.C.C.2d 316 (1972). The late complaint also suffered procedural defects. Commissioner Nicholas Johnson, in a forceful dissent, stated that it was “preposterous” not to consider Spock a serious candidate for the presidency, and claimed that CBS and NBC had not complied with their fairness obligations. *Id.* at 319, 321 (Commissioner Johnson, dissenting).

19. 1974 Fairness Report, *supra* note 1, at 26,377, par. 37; Editorializing Report, *supra* note 1, at 1251.

20. 1974 Fairness Report, *supra* note 1, at 26,377 n.13.

21. In *Cullman Broadcasting Co.*, 40 F.C.C. 576 (1963), the Commission articulated the doctrine as follows: “Where the licensee has chosen to broadcast a sponsored program which for the first time presents one side of a controversial issue, has not presented (or does not plan to present) contrasting viewpoints in other programming, and has been unable to obtain paid sponsorship for the appropriate presentation of the opposing viewpoint or viewpoints, he cannot reject a presentation otherwise suitable to the licensee — *and thus leave the public uninformed* — on the ground that he cannot obtain paid sponsorship for that presentation.” *Id.* at 577 (emphasis in original). The licensee may first explore the possibility of obtaining paid sponsorship for the contrasting presentation, including inquiries as to whether a particular reply spokesman will pay for air time. Such inquiries, however, cannot suggest that a contrasting view will not be presented unless paid sponsorship is forthcoming, nor can a demonstration of financial inability to pay be insisted upon as a condition precedent to airing of a reply spokesman. Letter to

that if paid sponsorship is unavailable to support presentation of a contrasting viewpoint, an otherwise acceptable reply spokesman cannot be rejected for lack of funds to pay for his presentation. It is more important to leave the public informed than to leave the licensee's pocket full.

Except in personal attack, political editorial, and *Zapple* situations,²² the Commission has not set down a specific formula for how broadcasters should find a spokesman and who that spokesman should be.²³ It has left this implementation strategy to the good faith, reasonable discretion of licensees.²⁴ No specific individual, group, or organization has any "right" to be the reply spokesman presenting a contrasting view to one which has already been broadcast.²⁵ The broadcaster, although not compelled to, may present the contrasting view, or views, himself.²⁶ However, the Commission has warned that licensees must take reasonable steps to ensure "presentations by genuine partisans

Rev. John H. Norris, 1 F.C.C.2d 1587 (1965); Station WGCB, 40 F.C.C. 656 (1965). Even if some contrasting views on an issue are presented, if there is a substantial imbalance in favor of one side, additional contrasting views have to be solicited without insisting that they be offered only under paid sponsorship. The Outlet Co. (WDBO-TV), 32 F.C.C.2d 33 (Bur. 1971). However, when spokesmen for a candidate air views favorable to their candidate, then comparable time must be given to spokesmen for the opposing candidate, and *Cullman* does not apply, i.e., free time need not be offered. Nicholas Zapple, 23 F.C.C.2d 707 (1970). See notes 104-12 and accompanying text, *infra*.

22. See notes 104-12 and accompanying text, *infra*.

23. *CBS v. Democratic National Committee*, 412 U.S. 94, 113 (1973); Hon. M. Gene Snyder, 49 F.C.C.2d 493, 494 (Bur. 1974); Harry Britton, 40 F.C.C.2d 112, 113 (Bur. 1973); Availability of Network Programming Time to Members of Congress, 40 F.C.C.2d 238, 246 (1973); Voters Organized to Think Environment, 39 F.C.C.2d 571, 572 (Bur. 1973); Boalt Hall Student Association, 20 F.C.C.2d 612, 615 (1969).

24. Mid-Florida Television Corp., 40 F.C.C. 620 (1964). In the 1974 Fairness Report, *supra* note 1 at 26,377 n.14, the Commission terminated a proceeding emanating from a Notice of Inquiry and Proposed Rulemaking, Docket No. 18,859, 23 F.C.C.2d 27, in which adoption of specific procedures to seek out opposition spokesmen under certain circumstances had been proposed.

25. Except in the personal attack, political editorial, and *Zapple* situations, as mentioned in notes 1 and 21, *supra*, broadcasters are not considered common carriers, 42 U.S.C. § 153(h) (1970). No party has a constitutional or statutory right of access to broadcast air time. *CBS v. Democratic National Committee*, 412 U.S. 94 (1973). "[T]he cornerstone of the fairness doctrine is not the right of any particular individual or group to speak but the public's right to be informed as to all significant points of view relating to an issue of public importance." Boalt Hall Student Association, 20 F.C.C.2d 612, 615 (1969). See also note 23 and authorities cited therein, *supra*.

26. Obligations of Broadcast Licensees Under the Fairness Doctrine (Notice of Inquiry and Proposed Rulemaking), 23 F.C.C.2d 27, 30-31 (1970) [hereinafter cited as Obligations Inquiry] (inquiry terminated on other grounds, 1974 Fairness Report, *supra* note 1, at 26,377 n.14). The licensee cannot rely solely on happenstance, such as an unknown caller on a call-in program, or a general interview program not presenting selected guests with contrasting viewpoints. WIYN Radio, 53 F.C.C.2d 428, 436 (1975); Rudolph P. Arnold, 52 F.C.C.2d 405, 407 (Bur. 1975).

who actually believe in what they are saying,"²⁷ and cannot "stack the cards" towards one point of view in selecting spokesmen.²⁸

Although the Commission has used forceful rhetoric to emphasize a licensee's obligation to vigorously pursue a contrasting spokesman,²⁹ it has in the past been satisfied with less than vigorous efforts. Simple over-the-air announcements inviting responsible reply speakers to air their views have been deemed sufficient.³⁰ In the 1974 Fairness Report, the Commission appeared to stiffen these solicitation requirements. It declared that there may be occasions, especially where "major issues" are "discussed in depth," when a licensee will have to demonstrate that he made "specific offers of response time to appropriate individuals in addition to general over-the-air announcements."³¹ However, the year before, in *Ronald E. Boyer*,³² the Commission had been satisfied with only over-the-air announcements by a licensee who had presented one side of a county government pay raise issue in more than fifty five-minute editorials spread over a two week period. The 1974 Fairness Report's new mandate has yet to be enforced.

The FCC has held that when a spokesman offers to make a reply presentation to a viewpoint already broadcast and the licensee rejects that spokesman as inappropriate, more intensive solicitation efforts must be undertaken. In this situation, over-the-air announcements are not enough, and specific offers to other parties must be made.³³ However, if the over-the-air announcements and specific offers do not elicit

27. 1974 Fairness Report, *supra* note 1, at 26,377, par. 41.

28. Editorializing Report, *supra* note 1, at 1253. *Accord*, *CBS v. Democratic National Committee*, 412 U.S. 94, 130-31 (1973); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 392 n.18 (1969).

29. Albeit, to present a major, representative viewpoint.

30. *Mid-Florida Television Corp.*, 40 F.C.C. 620, 621 (1964). In 1970 the FCC proposed that where a series of one-sided broadcasts on a controversial issue of public importance was made over a time period of nine months or less, that only as to the first broadcast could the licensee rely on over-the-air announcements to obtain reply speakers. If this fails, the licensee must directly contact specific individuals. The FCC also suggested that whenever the licensee editorializes, over-the-air announcements by themselves may not be an adequate method of soliciting opposing spokesmen. *Obligations Inquiry*, *supra* note 26, at 29-30. The 1974 Fairness Report, *supra* note 1, at 26,377 n.14, satisfied with the more flexible standard described below, terminated these proceedings.

31. 1974 Fairness Report, *supra* note 1, at 26,377.

32. 40 F.C.C.2d 1147, 1149 (Bur. 1973). The 1974 Fairness Report also quoted with approval *Mid-Florida Television*, 40 F.C.C. 620 (1964), which had suggested that one way licensees could fulfill their fairness obligations was by over-the-air announcements. 1974 Fairness Report, *supra* note 1, at 26,377, par. 37.

33. *Obligations Inquiry*, *supra*, note 26, at 28-29. *See also* *Ted Bullard*, 23 F.C.C.2d 41 (Bur. 1970) (after rejecting one reply spokesman as inappropriate, efforts by licensee to contact other spokesmen were necessary) and *Richard G. Ruff*, 19 F.C.C.2d 838 (Bur. 1969) (after rejecting one reply spokesman, additional efforts were necessary beyond offers specifically made to seven parties, which were refused).

a responsible reply spokesman, the licensee need not present any contrasting viewpoint.³⁴ This is so even if the broadcaster's side of the issue is presented in a number of different broadcasts.³⁵ The Commission has also held that if an appropriate reply spokesman is chosen by a commercial licensee, it is still reasonable for the licensee not to supply him with a tape or transcript of the original broadcast.³⁶

The FCC has reversed itself in judging the amount of effort required of licensees to assure presentation of contrasting viewpoints when the licensee has a personal or financial interest in the issue. A number of cases had held that a more extensive attempt than in the ordinary fairness situation would have to be made to ensure fairness.³⁷ As late as 1971 the Commission indicated that "licensees who editorialize on matters of personal concern which involve controversial issues of public importance should exercise extraordinary diligence to achieve fairness."³⁸ However cases in the mid-1970's changed this policy. The Commission's standard of review will remain the same in all fairness cases and will not vary if a licensee has a financial or other personal interest in a controversial issue of public importance.³⁹ The same degree of reasonableness and good faith will be demanded of all licensees, and the initial burden of proof will remain with the fairness complainant.⁴⁰

34. Columbia Broadcasting System, Inc., 34 F.C.C.2d 773 (1972), *reconsideration denied sub nom.* Thomas M. Slaten, 39 F.C.C.2d 16 (1972). Commissioner Johnson dissented, stating that denying air time to Slaten, the one reply spokesman who came forward, made "a mockery of the fairness doctrine." *Id.* at 19 (Commissioner Johnson, dissenting). See also Sherwyn M. Heckt, 40 F.C.C.2d 1150 (Bur. 1973) where, despite a gross imbalance in programming favoring Expo '74 (an international exposition), and a refusal to air the contrasting view of a reply spokesman, the licensee's over-the-air invitations, mailing of editorials to community leaders and others, and efforts to contact another key reply spokesman were deemed sufficient. If copies of editorials are used to solicit reply spokesmen, a specific offering of air time to present a contrasting viewpoint must also be included, at least to some individuals. Sending the editorial by itself is not enough. Capitol Broadcasting Co., 40 F.C.C. 615, 617 (1964).

35. See Columbia Broadcasting System, Inc., 40 F.C.C. 615 (1974).

36. Carol Los Mansmann, 40 F.C.C.2d 61, 63 (Bur. 1973); Mrs. Lynne H. Heidt, 29 F.C.C.2d 328, 329 (1971).

37. Service Elec. Cable TV, 30 F.C.C.2d 831 (1971); Springfield Television Broadcasting Corp., 45 F.C.C. 2083, 2086 (1965); WSOC Broadcasting Company, 40 F.C.C. 468, 469 (1958).

38. Springfield Television Broadcasting Corp., 28 F.C.C.2d 339, 341 (1971).

39. Fairness Report Reconsideration, *supra* note 1, at 697 n.9; Public Communication Inc., 50 F.C.C.2d 395, 401 (1974).

40. WNCN Listener's Guild, 53 F.C.C.2d 149, 157 (1975). However, "[a] specific showing, not here given, that a licensee's personal financial self-interest did *in fact* influence that licensee in its fairness doctrine decisions [might] affect the Commission's review as to that licensee's reasonableness and/or good faith. However, the bare statement by a complainant that a licensee is or may be personally interested in some issue does not shift the burden of proof to the licensee to show that its decisions with regard to that issue were 'more' reasonable." *Id.* at 155 (emphasis added).

IV. *The Balance-Format Dynamic*

Nowhere under the fairness doctrine is the licensee's discretion more apparent than in his capacity to determine the timing balance afforded to contrasting viewpoints and the format in which those viewpoints will be presented. The Commission has set some parameters, but even these are wide, allowing licensees a large amount of scheduling freedom.

It has already been noted that a licensee need not present contrasting viewpoints in the same broadcast, or even in the same series of programs.⁴¹ The FCC has also declared that the licensee may determine the format for presenting contrasting views, including the techniques of production and presentation.⁴² In *Boalt Hall Student Association*,⁴³ for example, the complainants argued that the only fair way for them to respond to California Governor Ronald Reagan's thirty-minute, uninterrupted broadcast of his views on campus unrest was to have a comparable uninterrupted period of time. The Commission disagreed, stating that it was reasonable for the licensee to present the complainants' or other parties' contrasting views in question-and-answer formats, in standard editorials, or in features and news stories. Other parties attempting to secure a format allowing uninterrupted presentations of their views to balance the uninterrupted presentation of the telegenic and articulate governor fared no better than the *Boalt* complainants.⁴⁴ Contrasting viewpoints to standard television station editorials ordinarily may be presented as items on news shows or as part of interview shows.⁴⁵ Spot announcements do not have to be balanced with other spot announcements.⁴⁶ Licensees may also

41. See *supra* notes 6-8 and accompanying text. See also Horace P. Rowley III, 39 F.C.C.2d 437 (1973), *reconsideration denied*, 45 F.C.C.2d 1069 (1974); James Batal, 24 F.C.C.2d 301 (1970).

42. 1974 Fairness Report, *supra* note 1, at 26,378, par. 42; Editorializing Report, *supra* note 1, at 1251, par. 10, 1258, par. 21.

43. 20 F.C.C.2d 612 (1969).

44. See *Phillip H. Schott*, 25 F.C.C.2d 729 (Bur. 1970), *review denied*, 29 F.C.C.2d 335 (1971) (uninterrupted presentation by Governor Ronald Reagan on the closing of California college campuses could be balanced by contrasting views presented in documentaries, public affairs programs, open mike programs, and newscasts). See also Democratic State Central Committee of California, 19 F.C.C.2d 833 (1968), where the Commission held that an uninterrupted 15 minute Report to the People containing Governor Reagan's views on state withholding taxes, a proposed tax increase, tuition fees, and other legislative proposals could be balanced by "a variety of formats including newscasts, public affairs and open mike programs." *Id.* at 835. However, one licensee, having refused complainant time and having aired only four brief news items, only two of which presented contrasting views, violated fairness obligations. *Id.*

45. Amedeo Greco, 22 F.C.C.2d 24 (1970).

46. Public Media Center, 59 F.C.C.2d 494 (1976).

delete and edit material offered by contrasting spokesmen before it is aired.⁴⁷

There are some format limits beyond which licensees cannot "reasonably" go. When contrasting viewpoints are presented they must not be presented in a hostile atmosphere, as in a phone-in show where the moderator encourages callers to ridicule the views of previous callers,⁴⁸ or where the moderator harasses callers with whom he disagrees by such techniques as cutting them off and insulting them.⁴⁹ A moderator for an interview program cannot interrupt with hostile questions a guest whose views he does not share, and allow those interviewees with whom he agrees to speak without interruption.⁵⁰ A licensee may not set down conditions for a reply spokesman which unreasonably censor that spokesman, such as requiring that his comments will not subject any party to ridicule, not contain personal attacks, and not create further fairness doctrine obligations.⁵¹ Presenting contrasting viewpoints in a brief news item where station staff merely categorize the reasons for opposing a particular ballot measure is not an adequate format for rebutting numerous editorials and a feature program which

47. *Happiness of Womanhood, Inc.*, 48 F.C.C.2d 1016 (Bur. 1974). See also *Judy Collins*, 31 F.C.C.2d 847 (Bur. 1970) (complainant's comments on the Chicago Seven Trial on the Dick Cavett Show could be edited by ABC). The Commission has distinguished the personal attack situation from general fairness doctrine cases: "As to the format, while licensees have wide discretion in this area in generally meeting the requirements of the fairness doctrine . . . the matter stands on a different footing with respect to the response to a personal attack. In that situation, the licensee cannot properly insist upon a roundtable or panel discussion. The person attacked . . . might reasonably conclude that a panel or roundtable discussion does not afford a comparable opportunity to reply, in view of their different structure (e.g., moderator; questions; debate) . . ." *John Birch Society*, 11 F.C.C.2d 790, 791-92 (1968).

48. *Butte Broadcasting Co.*, 22 F.C.C.2d 7 (1970). See *supra* note 28.

49. There is nothing wrong *per se* with a moderator engaging in harassing conduct. However, contrasting sides must be given "reasonably similar treatment in this respect." *Brandywine-Main Line Radio, Inc.*, 24 F.C.C.2d 18 (1970), *petition for reconsideration denied*, 27 F.C.C.2d 565, 566 n.1 (1971), *aff'd on other grounds*, *Brandywine-Main Line, Inc. v. FCC*, 473 F.2d 16 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973). "Fairness cannot be achieved when the expression of one view is deliberately treated in an antagonistic manner while the opposing view is given the opportunity for expression without any interference, harassment, or even opposing argument." *Brandywine-Main Line Radio, Inc.*, 24 F.C.C.2d 18, 24 (1970).

50. *Id.* at 23.

51. *Sidney Willens and Russell Millin*, 33 F.C.C.2d 304, 307-08 (1972), *petitions for reconsideration denied and dismissed*, 38 F.C.C.2d 443, 445-46 (1972). Such guidelines represent prior restraints and are vague. *Id.* See also *Shady Wall*, 31 F.C.C.2d 484 (Bur. 1971) (licensee cannot reasonably impose broad restrictions limiting reply spokesman's response to personal references originally made about him. On the other hand, the licensee cannot let a spokesman for one position veto the entire presentation of contrasting views on a controversial issue of public importance by refusing to appear in the format outlined by the licensee. *Evening News Ass'n*, 40 F.C.C. 441 (1950).

vigorously supports the measure.⁵² Nor can a licensee escape his fairness doctrine obligations by choosing a label for a particular format, such as calling an elected official's talk a "Report to the People."⁵³ It is the substance of the broadcast that counts, not the label.⁵⁴

Despite these limitations, it should be emphasized that by manipulating format, a licensee can favor one spokesman or viewpoint in comparison with another and be deemed reasonable by the Federal Communications Commission. This need not be a deliberate, vindictive effort on the licensee's part. The Commission tells the licensee that he is reasonable if he presents a short interview with a spokesman on one side of the issue and then gives the other side a lengthy and interrupted period of broadcast time. The licensee might scrupulously and in good faith follow the law, but the views presented by an interviewee are likely to have far less impact than views presented by a spokesman who can methodically, forcefully, and dramatically present himself without interruption. A short documentary, with cameras on location, illustrating one side of an issue may have far more impact than a contrasting spokesman in any studio format.⁵⁵ Punchy spot announcements may be far more influential than other types of programming. Yet in these situations balance requirements under the fairness doctrine may be satisfied.

V. *Balance and the 1974 Fairness Report: Total Time, Frequency, and Audience (Time of Day)*

The wide discretion afforded licensees and the difficulty encountered by the FCC in fairness cases is vividly illustrated in the "timing" decisions made by the FCC. "Timing" decisions are those which de-

52. Ted Bullard, 23 F.C.C.2d 41 (Bur. 1970). See also Brandywine-Main Line Radio, Inc., *supra* note 49, in which the Commission stated that "[i]n the context of opposing views set forth at length by commentators, such complete reliance on ordinary newscasts is obviously inadequate . . ." *Id.* 27 F.C.C.2d 565, 569.

53. Paul E. Fitzpatrick, 40 F.C.C. 443 (1950).

54. However, the FCC has refused to find fairness issues raised which require balancing in the entertainment and passing reference formats, despite its insistence that the label or type of format is irrelevant to fairness considerations. For entertainment cases see Thomas E. Mitchell, 54 F.C.C.2d 593 (Bur. 1975); American Broadcasting Co., 52 F.C.C.2d 98 (1975); Diocesan Union of Holy Name Societies, 41 F.C.C.2d 297 (Bur. 1973); George D. Corey, 37 F.C.C.2d 641 (1972). For passing reference cases see Gary Lane, Esq., 39 F.C.C.2d 938 (1973); Clinton R. Miller, 26 F.C.C.2d 920 (1970); National Broadcasting Co., 25 F.C.C.2d 735, 737 (1970); Anthony R. Martin Trigona, 19 F.C.C.2d 620 (1969), *reconsideration denied*, 18 RAD. REG. 2D 989 (1970).

55. For example, color films of an abortion operation, dramatically narrated by an anti-abortion speaker, may have far more impact than a pro-abortion spokesman airing his views in the confines of a studio chair. Color footage of deer and other animals at play near an oil well may distort the "minimal" amount of environmental damage done by the well in comparison with a speaker who merely cites arguments substantiating more than "minimal" damage.

termine the amount of time the licensee must devote to contrasting viewpoints, the number of times each viewpoint is to be presented, and the time of day during which the viewpoints must be presented.⁵⁶ The key question is what amounts to a reasonable balance with respect to these three factors.

In its 1974 Fairness Report, the Commission reemphasized its long-standing procedure of not setting down any "precise mathematical formula" for how time should be allocated to contrasting viewpoints, shunning any "mathematical ratio, such as 3-to-1 or 5-to-1 to be applied in all cases."⁵⁷ Privately, the Commissioners reaffirm the lack of exact guidelines in this area. As Benjamin Hooks suggests: "We don't have a written rule." Pointing to the "reasonable man" standard, he states, "Nobody has ever defined that standard with exactitude, and yet we have existed for two hundred years in the courts using that standard."⁵⁸

Despite the Commission's refusal to set down a precise formula for an appropriate balance it has, as in discussing a controversial issue of public importance, offered some vague indicators of reasonableness. As Milton Gross, Chief of the FCC's Fairness/Political Branch, states: "You have to look at the entire picture. There's no one thing." But, "time of day, frequency, things like that . . . are taken into consideration."⁵⁹

"Things that are taken into consideration" are discussed in more detail in the 1974 Fairness Report. Although the popular press and the general public continually confuse fairness requirements with equal time, the licensee clearly is not required to provide equal time for the various points of view under the fairness doctrine.⁶⁰ In its most com-

56. The length of time that may elapse between the broadcast of one viewpoint on a controversial issue of public importance and the broadcast of other viewpoints is another "timing" decision of importance. See Section VII, *infra*.

57. 1974 Fairness Report, *supra* note 1, at 26,378, par. 43.

58. Interview with Benjamin Hooks, Commissioner, FCC (Sept. 4, 1975). FCC Commissioner Charlotte Reid stated, "Again, I think, I don't like to use the word, but it's kind of a gut reaction . . . Each case is different." Interview with Charlotte Reid, Commissioner, FCC (Sept. 16, 1975). Commissioner James Quello rejects any set time ratio and states, "The rule itself is not specific." Interview with James H. Quello, Commissioner, FCC (Sept. 8, 1975). The other Commissioners interviewed also refused to state any personal formula for determining a set ratio of time that was so out of proportion that it violated the fairness doctrine. Each one said that his judgment varied with the situation, and the factors discussed *infra*.

59. Interviews with Milton Gross, Chief, Fairness/Political Branch, Complaints and Compliance Division, Broadcast Bureau, FCC (Sept. 3, 9, 1975, Dec. 8, 17, 1976) [hereinafter cited as Interviews with Milton Gross].

60. 1974 Fairness Report, *supra* note 1, at 26,378, par. 43. For examples of how the popular press confuses equal time and fairness see Chairman Burch's statement in Committee for Fair Broadcasting of Controversial Issues, 25 F.C.C.2d 283, 302 (1970) (Chairman Dean Burch, separate statement).

plete statement to date on the timing balance dilemma, the Commission stated:

While the road to predicting Commission decisions in this area is not fully and completely marked, there are, nevertheless, a number of signposts which should be recognizable to all concerned parties. We have made it clear, for example, that 'it is patently unreasonable for a licensee consistently to present one side in prime time and to relegate the contrasting viewpoint to periods outside prime time. Similarly, there can be an imbalance from the sheer weight on one side as against the other.' . . . This imbalance might be a reflection of the total amount of time afforded to each side, of the frequency with which each side is presented, of the size of the listening audience during the various broadcasts, or of a combination of factors.⁶¹

Thus, total amount of time devoted to differing viewpoints, frequency of broadcasts, and size of audience (which is related to the time of day of the broadcast) are all elements the Federal Communications Commission says it considers. But this is still vague. What division of total time between contrasting sides is too imbalanced? Precisely how much prime time airing of one viewpoint versus non-prime time broadcasting of another is unreasonable? What frequency comparison is acceptable? The "signposts" in the 1974 Fairness Report do not offer any answers.⁶²

VI. *Balance and the Case Law: Total Time, Frequency, and Audience (Time of Day)*

Unfortunately, the FCC case law does not provide much help in determining when opposing viewpoints have been sufficiently balanced.

61. 1974 Fairness Report, *supra* note 1, at 26,378, par. 44. Various Commissioners indicated personal reactions to the differing "sign posts." Commissioner Wiley, stating that he did not have any set ratio for total time division, indicated that the overall context is important. He pointed to frequency and time of day as being factors to consider. Interview with Richard E. Wiley, Commissioner FCC, and Larry Secrest, Administrative Assistant (Sept. 14, 1975). Commissioner Lee would not be "tied down to equal time" but a 10-to-one total time division "would raise serious questions in my mind." Time of day, frequency of broadcast, and the reaching of approximately the same audience are factors he considers. Interview with Robert E. Lee, Commissioner, FCC (Sept. 15, 1975). Commissioners Lee, Wiley and Hooks specifically reject the "stop-watch" technique of precisely timing contrasting sides. Commissioner Quello stressed that the total time division among contrasting sides should be close to equal time, and that "if you are on record on one side, you should be on record with as much on the other if it's a real controversial issue." Interview with James H. Quello, Commissioner, FCC (Sept. 8, 1975).

62. The Commission concludes its "timing" discussion by assuring licensees of protection by the key fairness doctrine decisional standard, *i.e.*, the FCC will not substitute its judgment for the licensees' but will limit its inquiry to whether licensees have acted in an unreasonable fashion. 1974 Fairness Report, *supra* note 1, at 26,378.

The Commission has steadfastly avoided setting down any "ideal" balance ratio that will be reasonable in every circumstance. The inconsistent, confusing, and sparse guidance offered by the Commission, as well as the wide discretion given licensees, can be seen in *National Broadcasting*,⁶³ *Public Media Center*,⁶⁴ and *Committee for Fair Broadcasting*.⁶⁵

In 1969 in *National Broadcasting*, the Commission decided whether a New York television station was in compliance with the *Banzhaf*⁶⁶ cigarette decision, which required that anti-cigarette programming be aired to balance pro-cigarette advertising. Despite the fact that the total time devoted to cigarette commercials was five times as great as the total time devoted to anti-smoking messages, the station's overall performance was not deemed deficient.⁶⁷ Although the Commission ignored the frequency of broadcasts in making the determination, it did consider audience size. Thus, insufficient anti-cigarette material had been programmed in prime time, when the largest number of viewers had been watching television. The Commission requested that the station take action to correct the prime time imbalance, although absolutely no guidance was given as to how much more prime time programming was necessary. Giving one side of an argument five times as much time to present its view hardly correlates with traditional notions of fairness, and gives licensees a great deal of discretion.⁶⁸ But a five-to-one ratio parameter is better than none at all in offer-

63. 16 F.C.C.2d 956 (1969).

64. 59 F.C.C.2d 494 (1976).

65. 25 F.C.C.2d 283 (1970).

66. WCBS-TV, 8 F.C.C.2d 381 (1967), *petitions for reconsideration, rulemaking, and stay denied*, 9 F.C.C.2d 921 (1967), *aff'd sub nom. Banzhaf v. FCC*, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969). In *National Broadcasting*, a petition to revoke the New York station's license had been filed, based on the alleged fairness violations. *National Broadcasting Co.*, 16 F.C.C.2d 956 (1969).

67. Although the five-to-one time ratio is not specifically mentioned in the published decision, Dean Burch maintains the decision was based on a Commission study indicating that ratio. *Wilderness Society*, 31 F.C.C.2d 729, 736 (1971) (Chairman Burch, concurring).

68. *See also Wilderness Society*, 31 F.C.C.2d 729, 735, 739 (1971) (Chairman Burch, concurring) (Appeal where a two-to-one ratio was held reasonable). Chairman Burch also indicated that an unpublished staff ruling on an urgent fairness matter once regarded a three-to-one time ratio as reasonable. *Id.* at 736. The full Commission, however, never reviewed the ruling. In terms of total time division between contrasting views, Tracy Weston, the noted communications law public interest attorney, has indicated that a ratio greater than six-to-one would be disproportionate enough to trigger the fairness doctrine in any instance, and that "the more important the issue, the closer the balance required." *ACCESS*, No. 10, at 11 (May 19, 1975). Andrew Shapiro, in his book *MEDIA ACCESS*, states that the Commission has indicated "an imbalance in time exceeding ten-to-one is clearly unreasonable." A. SHAPIRO, *MEDIA ACCESS*, 158 (1976).

ing licensees guidance and complainants a basis to increase airing of contrasting viewpoints.⁶⁹

In *Public Media Center*, decided in 1976, the Commission addressed complaints that thirteen California licensees had aired power company advertisements which urged the immediate construction of nuclear power plants and use of nuclear power, but did not adequately broadcast contrasting views.⁷⁰ The Commission ruled that eight of the licensees had been unreasonable and would have to present additional contrasting programming. Never before had so many stations been found in violation of the fairness doctrine in a single case.

When one looks beneath the apparent enforcement toughness of the FCC, however, it becomes apparent that the Commission actually granted licensees wide discretion in terms of frequency of broadcast. Total-time division is a far more important signpost than the number of broadcasts on contrasting sides of an issue. Thus radio station KATY,⁷¹ with a nearly equal total-time division, was deemed reasonable despite the fact that pro-nuclear broadcasts had been presented thirty-four times more frequently than anti-nuclear broadcasts. Other stations with close total-time divisions⁷² were held reasonable despite frequency variations of twenty-five-to-one,⁷³ sixteen-to-one,⁷⁴ and fourteen-to-one.⁷⁵

Focusing on total-time comparison ignores the importance of broadcast repetition. Frequency of broadcast is important because a greater

69. However, even this outside limit (one of the few times the FCC has illustrated a reasonable total time ratio) has little value as precedent since the cigarette balancing decisions have been considered *sui generis*, and were recently reversed in the 1974 Fairness Report, *supra* note 1, at 26,382, par. 70.

70. 59 F.C.C.2d 494 (1970).

71. *Id.* at 499-500.

72. In no case was the total time ratio greater than two-to-one. *Id.*

73. *Id.* at 503-04, 519 (KJOY).

74. *Id.* at 509, 523 (KVON).

75. *Id.* at 505-06, 520 (KPAY). See also *Wilderness Society*, 31 F.C.C.2d 729, 735 (Chairman Burch, concurring) ("four-or-five-" to-one); *Leading Families of America*, 31 F.C.C.2d 594 (Bur. 1971) (five-to-one); *Letter to Marjorie Wood*, 8330-E, C4-1644, C5-134 (Bur. July 13, 1976) (mimeograph) (seven-to-four). But see *George E. Cooley*, 10 F.C.C.2d 969 (1967), where, in the context of the political editorial rule, the Commission decided that a four-to-one frequency ratio of broadcasts of the same length did not constitute a reasonable presentation balance. The licensee had decided that "broadcast time could most effectively be used by frequent repetition of a brief statement rather than by less frequent broadcast of longer statements" and the complainant deserved a "comparable opportunity." *Id.* See also *Citizens for Responsible Government*, 25 F.C.C.2d 73 (Bur. 1970) where, assuming editorials and editorial replies were about the same length, the total time ratio was roughly four-to-one. The Commission emphasized the timing of the broadcasts before an election, and "the frequency of the broadcasts (which involve the factors of effective repetition and the reaching of possibly different audiences)" in determining that the licensee had acted unreasonably, where the frequency ratio was approximately nine-to-one. *Id.* at 74.

audience can be reached, because a more diverse audience can be tapped since the broadcasts can be made at differing times of day, and because the larger number of broadcasts can be extended over a longer period of time, thereby continuously stimulating dialogue in the community. The Federal Communications Commission itself has noted the capacity of frequently repeated spot announcements to have significant impact by reaching huge audiences. In assessing the impact of cigarette commercials, the Commission multiplied the frequency of each commercial times the estimated audience for each one to determine the number of "exposures" of the cigarette message to the broadcast audience.⁷⁶ Is it fair to allow one side thirty-four times more broadcast opportunities than another, even if the total time each side is accorded is approximately the same? Obviously, licensees have been granted a very wide berth with respect to balancing the frequency of individual broadcasts. But the major articulated objective of the fairness doctrine is to inform the American public. Therefore, the audience reached, the number of Americans thus informed, theoretically should be a key measure for fairness comparisons. Such lopsided frequency ratios indicate that the Federal Communications Commission has not adequately considered the matter.⁷⁷

The time of day when programming is aired is, of course, also critical to audience-reached considerations. In its sensitivity to broadcasts aired in prime time versus those shown in non-prime time, the Commission seemed concerned about audience-reached in *National Broadcasting*. However, in *Public Media Center* decisions were made as to the activity of several licensees without consideration given to prime time programming. Thus, station KVON broadcast ninety-four spot advertisements, fifty-nine (over sixty percent) of which were aired in prime time.⁷⁸ Contrasting views were presented in a one-hour program and five newscasts, none of which were aired in prime time.

76. Notice of Proposed Rulemaking, Advertisement of Cigarettes, 16 F.C.C.2d 284, 288 (1969).

77. With some licensees, however, the Commission professed concern about frequency and audience disparities. Thus with KSRO, the total time imbalance, "when coupled with gross disparities in frequency and audience" made KSRO's actions unreasonable. *Public Media Center*, 59 F.C.C.2d 494, 522 (1976) (KSRO). However, the frequency ratio of 8.6-to-one for KSRO was far less than other stations which were found to have acted reasonably, and at least some of the contrasting views had been aired in prime time. *Id.* This is not to say that the KSRO decision was wrong; however, it does raise questions about consistent decision making, and just what standard is to be followed.

78. *Id.* at 509 (KVON). KVON had also run 27 promotional announcements for its one hour anti-nuclear show. *Id.* However, the FCC, and apparently the licensee, do not indicate what was said on these announcements. Without more, it is difficult to see how they can be weighed on the anti-nuclear side.

The approximate three-to-two total-time rating and sixteen-to-one frequency ratio were regarded as reasonable by the FCC, and the Commission did not even mention the prime time to non-prime time disparity.

When compared with *National Broadcasting* the total-time ratios in *Public Media Center* appear inconsistent. Licensee total-time ratios of approximately three-to-one were held to be unreasonable in *Public Media Center*. For example, KSRO⁷⁹ had a total-time ratio of approximately three-to-one, far below the five-to-one ratio held reasonable in *National Broadcasting*, and KSRO's frequency ratio of approximately eight-to-one was similar to the frequency ratio in *National Broadcasting*. Despite these figures, KSRO's actions were held to be unreasonable.

Just what are the appropriate total-time and frequency ratios? What combination of these figures makes a licensee's broadcasting unreasonable? How does prime time programming affect a licensee's judgment? These questions are not answered by *National Broadcasting* and *Public Media Center*. A confusing, and at times contradictory, set of indicators is all that can be extracted.

The 1970 *Committee for Fair Broadcasting* case further confused the situation. Among the complaints in that case were allegations that the commercial television networks had not adequately presented views on the Indo-China War issue which contrasted with those expressed by President Nixon in five "prime-time uninterrupted addresses."⁸⁰ The networks had presented leading opposing spokesmen discussing views in prime time. ABC and CBS had presented the Chairman of the Democratic National Committee, but he had addressed the war issue for only a few minutes. NBC, however, had presented a half-hour prime time presentation in which spokesmen opposed to the war expressed their views, uninterrupted by questions. In comparison with the "prime time" addresses of the President, NBC's total-time ratio on the war issue was approximately 4.4-to-one (Nixon versus opposing views) and its frequency ratio was five-to-one (Nixon versus opposing views). If the other extensive programming on the war were included, such as newscasts, documentaries, and interview shows, which the Commission considered balanced, the total-time and frequency ratios would be even smaller.

Despite these figures, the Commission considered all three net-

79. 59 F.C.C.2d 494, 507-08, 522 (1976).

80. 25 F.C.C.2d 283, 296 (1970). Actually, one of the addresses occurred between 6:00 p.m. and 6:14 p.m. The hours from 7:30 p.m. to 11:00 p.m. "usually encompass greater viewing." *National Broadcasting Co.*, 16 F.C.C.2d 956, 957 asterisk note (1969).

works' programming on the war issue unreasonable.⁸¹ It not only ordered that more views on the war contrasting with those expressed by Nixon be aired, but also that a leading spokesman be given some time in an uninterrupted format.⁸² Predictably, the Commission refused to specify the length of time to be given to the contrasting spokesman.

The Commission's format decision seems to contradict *Boalt Hall Student Association*, where an uninterrupted format was not deemed important. The total-time ratios, at least for NBC, were lower than in *National Broadcasting* yet the opposite result was reached. NBC's unreasonable frequency ratios were far lower than those considered reasonable in *Public Media Center*, and the concern for prime time programming was not consistently evidenced in prior cases. It should be noted that in subsequent cases the Federal Communications Commission has refused to order reply programming to Presidential addresses, as it did in *Committee for Fair Broadcasting*.⁸³

81. However, despite the conclusion that NBC's activity had been unreasonable, in light of its half-hour prime time broadcast preventing contrasting views, NBC would have "the least requirement" for counter-programming. *Committee for Fair Broadcasting*, 25 F.C.C.2d 283, 298 (1970). No specifics on the "requirement" were offered.

82. However, the Commission indicated that these responses were not required under the *Zapple* "political party" doctrine. See *supra* notes 104-12 and accompanying text. Also, in *Republican National Committee*, 25 F.C.C.2d 739 (1970), the Commission stated: "Presidential appearances (other than as a candidate for re-election, when of course, 'equal opportunities' would be applicable, or, in the event of its repeal, fairness in the 'political party' sense) do not come within the 'political party' doctrine" *Id.* at 744.

83. The Democratic National Committee, litigating under the leadership of then-noted Washington attorney Joseph Califano, was extremely active in seeking response time to President Nixon. Despite the Committee's vigorous efforts, the Commission refused to grant such requests. In a case where the Committee sought a reply to the President's economic message, the Commission stressed that prime time programming was an important balancing factor, in accord with *Committee for Fair Broadcasting* 25 F.C.C.2d 283 (1970), but it found that two prime time radio-TV presidential addresses — for an approximately 3.7-to-one total prime time ratio — were distinguishable from five prime time addresses in an earlier opinion. Moreover, press conferences by the Treasury Secretary were not included in the calculation, and non-prime time appearances by the President were de-emphasized. *Democratic National Committee*, 33 F.C.C.2d 631 (1972), *aff'd* *Democratic National Committee v. FCC*, 481 F.2d 543 (D.C. Cir. 1973). In another decision the Commission seemingly ignored audience considerations, and refused the DNC's request to reply to two programs, one consisting of an interview of the President and the other of a presidential address on American Southeast Asia policy. The key fact which distinguished the case from *Committee for Fair Broadcasting* was that the interview programs ranged over a variety of issues, and did not focus on the single issue of the Vietnam War. The Commission also refused to consider the presidential appearances as falling under the *Zapple* doctrine. *Democratic National Committee* 31 F.C.C.2d 708 (1971), *aff'd* *Democratic National Committee v. FCC*, 460 F.2d 891 (D.C. Cir. 1972). See also note 101 and accompanying text *infra*. Moreover, in 1972 the Commission rejected the demand of the DNC and the American Civil Liberties Union that, whenever a President speaks, there be a mandated opportunity to reply by an opposition party spokesman. The Commission, aside from considering this a matter for Congress to resolve, suggested that such a regulation would infringe upon licensee discretion and not be a sound policy. *The Handling of Public Issues Under the Fairness*

This is not to say that the result in *Committee for Fair Broadcasting* was bad for the country. On the contrary, conveying in prime time additional views about a vital public issue to tens of millions of Americans was an extremely valuable contribution to democratic debate. However, major questions remain concerning what is the precedent in this area to guide licensees as well as complainants, whether a government agency should engage in such inconsistent behavior, and whether the government should be involved in such a balancing exercise with broadcasters, who are afforded at least some protection under the first amendment.

VII. *Balance: The Elapse Time Dynamic*

Another balancing factor which must be considered, and which further complicates the question of whether a licensee has been reasonable, is the length of time that may elapse between the airing of one side of an issue and the airing of the contrasting side. As in other fairness matters, the FCC has refused to set down precise guidelines on what is a reasonable length of elapse time. The Commission has asserted that there is a public interest in receiving "timely information on public issues" and that "[t]imeliness of the licensee's presentation of contrasting viewpoints" is a factor to be considered in "determining the reasonableness of the licensee's handling of an issue."⁸⁴ Despite the declared importance of elapse time considerations, the Commission has frequently failed to even mention elapse time, much less seriously consider it in its opinions.⁸⁵

When it has focused on the elapse time question, the Commission has pointed out that the facts surrounding a particular controversy will bear on the licensee's reasonableness. Thus whether contrasting views are presented in "reasonably close proximity" may depend on whether

Doctrine and the Public Interest Standards of the Communications Act (First Report — Handling of Political Broadcast), 36 F.C.C.2d 40, 46-48 [hereinafter cited as First Report]. The ruling was later published as Appendix A to the 1974 Fairness Report, *supra* note 1, at 23,385, since it was the first part of the comprehensive report which resulted from the fairness inquiry. See also Richard B. Kay, 33 F.C.C.2d 1006 (1972) (Commission refused to order the networks to make time available to the Presidential candidate of the American Party to reply to the State of the Union message); and Senate of the Commonwealth of Puerto Rico, 37 F.C.C.2d 579 (1972) (Commission refused to order a Puerto Rican television station to provide time for the Senate to respond to the State of the Commonwealth address by the Governor of Puerto Rico).

84. Northern Plains Resource Council, 59 F.C.C.2d 482 (1976).

85. See, e.g., Democratic National Committee, 33 F.C.C.2d 631 (1972): "I search the majority's opinion in vain . . . for any evidence that it even *considered* the question of the time span within which the President's appearances took place. I cannot see how as a matter of rational common sense the majority can come to a decision without even considering this crucial factor." *Id.* at 641-42 (Commissioner Johnson, dissenting [emphasis in original]).

the issue is a "continuing issue, issue of a seasonal nature, one that is to be resolved in a particular election, or a pending item of legislation."⁸⁶ The fairness doctrine goal of informing the public would be circumvented if contrasting views are not presented "before the issues become moot."⁸⁷ The Commission has gone so far as to recognize that when one viewpoint is broadcast closer to the day of an election, that view may have more impact on the public, and is entitled to greater weight in any balancing judgment.⁸⁸

However, when election days are not imminent and the issues are continuing, the FCC has allowed licensees vast discretion in the timing of contrasting view presentation. A six-month interval between broadcasts of contrasting views on sex education in public schools was reasonable,⁸⁹ as was a two-year interval between the airing of differing views on nuclear energy.⁹⁰

86. *National Broadcasting Co.*, 22 F.C.C.2d 446, 448 (Bur. 1970), *rev'd on other grounds* 25 F.C.C.2d 735 (1970). See also 1974 Fairness Report, *supra* note 1 at 26,378, par. 47 (the public's interest in "receiving timely information on public issues" must be safeguarded); *James Batal*, 24 F.C.C.2d 301 (Bur. 1970) (opposing views must be presented "within a time reasonably approximate to the initial presentation.").

87. *Northern Plains Resource Council*, 59 F.C.C.2d 482 (1976).

88. *Citizens for Resource Council*, 59 F.C.C.2d 73 (Bur. 1970). See *supra* note 74, (additional importance given to broadcast made one day before the election); *Timothy K. Ford*, 57 F.C.C.2d 1208 (Bur. 1976). "The purpose and goal of the fairness doctrine is 'the development of an informed public opinion through the public dissemination of news and ideas concerning the vital public issues of the day' . . . It is obvious that this goal could be frustrated if contrasting viewpoints on controversial issues of public importance were not presented in a timely fashion, before the issue involved becomes moot. Therefore, the fact that an issue may be the subject of a vote in an election could be a factor appropriately considered in determining the reasonableness of the licensee's handling of the issue." *Id.* at 1209.

89. *Robert R. Soltis*, 23 F.C.C.2d 62 (Bur. 1970).

90. *Public Media Center*, 59 F.C.C.2d 494 (1976). But in this case the Commission failed to even mention that an election on the issues involved was imminent, and to consider this in its balancing judgment. The decision appears inconsistent with *National Broadcasting Co.*, 22 F.C.C.2d 446 (Bur. 1970), *rev'd on other grounds* 25 F.C.C.2d 735 (1970), in which the Commission stated "The 2-year lapse between presentations of contrasting views on a particular issue clearly cannot be considered reasonable under the circumstances." 22 F.C.C.2d 446, 448. One distinguishing ground may be the Commission's assertion that the nuclear energy issue in *Public Media Center* was a continuing controversy and of public importance. But the Commission does not adequately deal with why the private pilot safety issue in *National Broadcasting* is not such a continuing issue. Indeed, in light of the NBC broadcast and the reaction it provoked, one would think that the issue was continuing and current. See also *Northern Plains Resource Council*, 59 F.C.C.2d 487 (1976) (alleged elapse time between contrasting view presentation on proposed power generating plants and transmission lines of approximately one year held not unreasonable, and the complaint that the licensee neglected one viewpoint for a significant period of time rejected since controversy was continuing); *John Cervase*, 48 F.C.C.2d 335 (Bur. 1974) (six-month interval between contrasting views on "Kawaida Towers" not unreasonable); *William J. Strawbridge*, 23 F.C.C.2d 286 (Bur. 1970) (several-month interval between airing of contrasting views of Arab-Israeli situation not unreasonable).

The lapse time problem becomes even more acute when considered in light of the time it may take the FCC to decide a fairness matter. One detailed study of fairness cases considered by the Commission during the first six months of 1973 found that there was an "average delay of about eight months between broadcast and ruling," and there were a "number of cases in which several years elapsed."⁹¹ Another study which charted six fairness cases ruled on in 1970 revealed an average of seven months between the date of a fairness complaint and the Commission ruling.⁹²

In light of the wide elapse time parameters licensees are allowed and the other balancing problems discussed above, one is forced to question the value derived from the balancing part of the fairness doctrine. How many people who see the first presentation of views in an editorial during evening prime time are going to see the broadcast of contrasting views in an early morning interview show several months later? What portion of the original audience will see the second presentation if it is made in a prime time interview show several months later? Surely only a small percentage. Suppose the opposing views are aired in a reply editorial on the same prime time program at the same time, but three months later? Viewer devotion to a particular show will certainly cause more of the original audience to see the reply editorial, but a sizable number will not. Even if all of the audience that saw the original broadcast see the reply broadcast, what effect would a three-month-old presentation have? Is there a fair basis for comparison? How does one account for the possibility that viewers may simply switch the dial if they do not want to hear particular views?⁹³

From this perspective the fairness doctrine may be seen as actually causing unfairness. Its first component demands the airing of views on a controversial public issue. A spokesman may present his biased views on a prime time show, say at 7:30 P.M. Viewers hear only his side of the issue. Three months later the part two component of the doctrine demands a contrasting presentation which may be in prime time, although several hours later, say at 10:30 P.M. A different audience hears

91. H. GELLER, *THE FAIRNESS DOCTRINE IN BROADCASTING* 37 [hereinafter cited as GELLER].

92. Swartz, *Fairness for Whom? Administration of the Fairness Doctrine, 1969-70*, 14 B. C. INDUS. & COM. L. REV. 457, 464 n.46 (1973). Two 1969 Rulings were also charted in the study but were not included in calculating the average given in the text, which relates to 1970 decisions.

93. Indeed, how does one include the possibility that people may record a show and see it during a different time period, as is now possible with SONY'S new Betamax machine. See *Two Studios Sue Over Betamax*, BROADCASTING, Nov. 22, 1976 at 45.

a biased view from the contrasting perspective. Even those persons who have heard the original broadcast may well have forgotten the arguments and facts presented. Where is the fairness? In a sense, the fairness doctrine becomes the "unfairness doctrine," allowing biased presentations to different audiences.

Of course, many licensees include contrasting views within the contents of a single show, such as a panel discussion, a news story or a documentary. If contrasting views are aired in a different show in prime time, as opposed to prime versus non-prime time, the audience carryover is greater. The smaller the elapse time between shows, the more recall viewers will have of the originally presented views.

The only way to insure absolute fairness would be to require contrasting views to be presented in the same broadcast. Spokesmen of precisely equal vigor, with precisely equal time allotments, would have to be chosen. This would require a degree of interference with licensee freedom that the Commission wisely refuses to undertake. Even this could not assure complete equality since the impact of spokesmen may differ and viewers may temporarily leave their sets or turn the dial, missing parts of the arguments. The inherent limitations of any "fairness doctrine" in creating fairness must be realized.

VIII. *Balance Problems: Stop Watches*

Chairman Dean Burch, in a concurring opinion in *Wilderness Society*,⁹⁴ offered some insights on the problems of timing balance. In *Wilderness Society* the Commission, after using a stopwatch to find a two-to-one total-time ratio on pro- to anti-pipeline viewpoints,⁹⁵ and without discussing in its decision prime time versus non-prime time presentations, had concluded that the pipeline issue had been reasonably discussed. Burch, in concurring, stated:

[T]his involves, first, an examination of the scripts to determine whether the material was pro-pipeline, anti-pipeline, or just neutral background. It then involves either counting lines in the scripts or pulling out the stop-watch to estimate the time afforded each side. (Which assumes, of course, that there are only two sides to the issue — and in this as in most such cases, there may in fact be a multiplicity of 'sides' many of which may deserve an airing.) . . . All these figures must also be viewed against the fact that they are

94. 31 F.C.C.2d 729 (1971).

95. *Id.* at 740. The frequency ratio was "4 or 5 to 1." *Id.* at 735 (Chairman Burch, concurring). See also Miami Beach Betterment Ass'n, 27 F.C.C.2d 350, where the "stop-watch" technique was further complicated by counting lines on newscasts, getting a contrasting view ratio based on the line comparison, and combining this with time ratios for other programming to reach a judgment.

constantly changing, in view of NBC's continuing coverage of the issue.⁹⁶

Looking to previous cases the Chairman asked:

[W]hat do past Commission precedents tell us about this specific matter? . . . I am forced to conclude that the answer, after twenty years of administration of the doctrine, is . . . 'virtually nothing' . . . And I strongly suspect that the issue has not been resolved precisely because it is so thorny. I for one find it impossible to feel very confident or secure about a process that relies on the stopwatch approach — that is, making judgments, and then quantifying the category into which each presentation falls. And this is only the beginning. There are such additional ramifications as the time and style of the various presentations (does a prime-time spot count two times more heavily than a mid-morning interview? three times? or ten times?), the size and make up of the audience, and (as NBC urges in this case) the relative weight that should be accorded an indirect commercial announcement as against the direct rebuttal that would be afforded under a remedial fairness doctrine ruling. And how do we take into account the fact that a broadcaster, like any good journalist, stays with a hot issue until it's resolved — do we simply adopt an arbitrary cut-off? It might even be argued that we have to consider the dial switching habits of the average viewer — which means that only rarely does he recall where he viewed which side of what controversial issue! The road here could lead to a series of decisions with enough variables and shadings to rival a medieval religious tract. . . . I fear that, under the present circumstances, both licensees and the public can only fall back on prayer to divine the Commission's intent. . . . I believe it markedly serves the public interest, and specifically, the purposes of the First Amendment, to face the issue head on: namely is there some workable middle course?⁹⁷

John Eger, a former FCC staff member and later Acting Director of the Office of Telecommunications Policy, provided further perspective:

I was there when we used to take a stop-watch upon a complaint and we would watch a program or listen to it and we would say,

96. *Wilderness Society*, 31 F.C.C.2d 729, 735 (1971) (Chairman Burch, concurring).

97. *Id.* at 736-38 "Of course, the fairness doctrine is subjective and difficult to enforce on a case by case basis. But that's what the common law has been all about for centuries. And its creation is what commissioners and judges are paid to do. 'Fairness,' as it has been interpreted over the years, is no more difficult to apply — or to use in guiding men's behavior — than 'negligence,' 'false and misleading,' 'tend to create a monopoly' or the 'reasonable man.' Any of these concepts can be ridiculed and made to appear impossible of administration — especially by those who don't like their effect in the first place. But such is the stuff of which 'law and order' is made. It has worked pretty well. It should be improved where it can be. But the anarchy that remains when it's disposed of is a pretty poor substitute." *Id.* at 743 (Commissioner Johnson, concurring in part, and dissenting in part).

'7 minutes pro, 6 minutes con, X minutes neutral.' Now if that isn't getting into the broadcasters' knickers, I don't know what is. And it seemed to me, after 3 years of that . . . , that there was no way of really administering the fairness program on an ad hoc basis that was going to be satisfactory. Because as soon as we did that, someone would say, 'Yes, but the fairness doctrine is balanced over a period of time.' And they said, 'Well get out the old programs.' And we'd start counting them. And then we said, well what about the future? Well, we're going to write them and ask them. And there was never a satisfactory way. Furthermore, we used to argue about whether it was 7 minutes or 8 minutes, depending upon what someone thought. . . .⁹⁸

Henry Geller, the noted fairness doctrine commentator, feels that a "middle course," at least in terms of balance ratio, would still be unsatisfactory. According to Geller it seems "inappropriate for government to be engaged in a stop-watch process where it makes judgments as to positions taken in a presentation with regard to particular issues — for, against or neutral. This can be an editorial process of the most sensitive nature."⁹⁹

The administrative problems in this area do indeed accentuate the very real first amendment concerns of broadcasters. There is no objective way of determining precisely which format, program, frequency, or total time allocation is the most effective formula for reaching an audience. Advertising agencies and political candidates often have differing television and radio strategies. Any "second guessing" of a broadcaster's judgment in these matters cannot rest on an exact balancing science.¹⁰⁰

IX. *Balance Dangers: A Republican Reply, Zapple, and A CBS News Complaint*

The difficulties which may be generated by over-zealous FCC involvement in licensees' balancing decisions is seen in an aspect of the *Committee for Fair Broadcasting* case not discussed above.¹⁰¹ In that

98. Interview with John Eger, Acting Director, Office of Telecommunications Policy, (Sept. 2, 1975). Eger had worked as a legal assistant to Dean Burch as well as an "attorney advisor" in the FCC General Counsel's office.

99. GELLER, *supra* note 91, at 33-34 (emphasis omitted).

100. If the FCC and Congress continue the fairness doctrine in its present form, the FCC should establish a consistent set of precedents, and explain how it reaches its decisions. A two-tiered approach should allow licensees far greater discretion in news broadcasts, documentaries, panel shows, and all other public issue programming than in explicit licensee editorials. With the former, only broad balancing parameters should be utilized to judge a licensee's reasonableness.

101. *Committee for Fair Broadcasting*, 25 F.C.C.2d 283, 299-301 (1970), *petition for reconsideration denied sub nom.*, Republican National Committee, 25 F.C.C.2d 739 (1970), *rev'd sub nom.* *CBS v. FCC*, 454 F.2d 1018 (D.C. Cir. 1971).

case the Commission also ruled on a complaint by the Republican National Committee (RNC) asserting that the RNC was entitled to time to respond to an address by the Chairman of the Democratic National Committee (DNC). The DNC Chairman, Larry O'Brien, had been given time by CBS in a newly conceived "Loyal Opposition" series to respond to speeches of President Nixon and other Republican spokesmen¹⁰² so that CBS could achieve "fairness and balance in the treatment of public issues."¹⁰³

The Commission agreed with the RNC that it was entitled to reply time, relying on the well-known 1970 decision, *Nicholas Zapple*.¹⁰⁴ In *Zapple* the Commission had ruled that if supporters or spokesmen for a candidate purchase broadcast time in which they discuss their candidates and/or the campaign issues and/or criticize another candidate, then comparable time must be offered spokesmen for the opposing candidate.¹⁰⁵ The *Cullman* free time requirement is not applicable.¹⁰⁶ The Commission saw the *Zapple* ruling as a means to implement the thrust of Section 315's equal time rule, which could be thwarted if spokesmen were permitted to urge their candidates' election without a near equal time obligation for opposing spokesmen.¹⁰⁷ Indeed, the "*Zapple* doctrine" has been known as the "quasi-equal opportunities" corollary to the fairness doctrine.¹⁰⁸ It seemed

102. A few years later Lawrence O'Brien was personally subjected to a Republican communication offensive of a very different order, when his phone was wiretapped in the famous Watergate break-in.

103. Telegram from Frank Stanton, President of CBS, to Lawrence O'Brien, June 22, 1970, cited in *CBS v. FCC*, 454 F.2d 1018, 1021 n.3 (D.C. Cir. 1971).

104. 23 F.C.C.2d 707 (1970). The Commission acted in response to a letter from Nicholas Zapple, Communications Counsel, Committee on Commerce, U.S. Senate, requesting an interpretive ruling.

105. "[B]arring unusual circumstances, it would not be reasonable for a licensee to refuse to sell time to spokesmen for or supporters of candidate B comparable to that previously bought on behalf of candidate A." *Id.* at 708.

106. "When spokesmen or supporters of candidate A have purchased time, it is our view that it would be inappropriate to require licensees to in effect subsidize the campaign of an opposing candidate by providing candidate B's spokesmen or supporters with free time . . ." *Id.* at 708. Even if criticism of a presidential candidate by an opponent's supporters is allegedly "false and misleading" and malicious, the criticized candidate's supporters are not entitled to free time under *Zapple*. Committee to Elect McGovern-Shriver, 38 F.C.C.2d 300 (1972).

107. 47 U.S.C. § 315 (1971). In fact, Commissioner Johnson declared: "I see no legal reason why the Commission could not rule that sec. 315(a) encompasses spokesmen for or supporters of political candidates as a logical extension of congressional intent. Instead, the majority has brought supporters and spokesmen in under the fairness doctrine, and then excluded them from its free time aspect established in *Cullman* . . ." Nicholas Zapple, 23 F.C.C.2d 707, 710 n.2 (1970).

108. First Report, *supra* note 83, at 41, 48-49. However, the *Zapple* doctrine "does not overrule" the holding of Lawrence M. C. Smith, 40 F.C.C. 549 (1963). See *supra* note 16 and accompanying text. Thus, "fringe party candidates" need not be given treat-

inappropriate to require one campaign to subsidize another under a *Cullman* mandate. Thus, *Zapple*, in the context of a political campaign, requires that almost equal balancing ratios be offered¹⁰⁹ to individuals, but comparable payment may be demanded for the reply opportunity.¹¹⁰ In the Commission's words, *Zapple*, "because it does take into account the policies of Section 315, requires both more (comparable time) and less (no applicability of *Cullman*) than traditional fairness."¹¹¹

ment comparable to major party candidates, and can still, in effect, be ignored. First Report, *supra* note 83, at 49-50.

109. The Commission has stated that treatment of competing supporters "while not mathematically rigid" must at least "take on the appearance of rough comparability. If the DNC were sold time for a number of spots, it is difficult to conceive on what basis the licensee could then refuse to sell comparable time to the RNC. Or, if during a campaign the latter were given a half hour of free time to advance its cause, could a licensee fairly reject the subsequent request of the DNC that it be given a comparable opportunity? . . . No licensee would try to act in such an arbitrary fashion." First Report, *supra* note 83, at 49. Thus in the *Zapple* situation, frequency and total time ratios must be approximately equal, and the conditions offered for each individual broadcast must be comparable.

110. See Wyoming Broadcasting Co., 27 F.C.C.2d 752 (1971) in which the Commission ruled that charging one candidate's supporters \$1.50 and another's \$1.25 for a thirty-second announcement, and giving one candidate twice the amount of time as others for the same price, violated the *Zapple* doctrine.

111. First Report, *supra* note 83, at 50. Note also, that unlike the general fairness doctrine, *Zapple* is not applicable to bona fide "newscasts." *Id.* at 50 n.12. Although the FCC stops at "newscasts," it still discussed the non-applicability of *Zapple* in the context of the equal time exemptions in 47 U.S.C. § 315 which include bona fide interviews, documentaries, and news events. Thus, presumably, *Zapple* is not applicable to these other news categories despite the FCC's sloppy wording. This is the way the National Association of Broadcasters has interpreted *Zapple*. See NATIONAL ASSOCIATION OF BROADCASTERS, POLITICAL BROADCAST CATECHISM 36, Q181 (7th ed. 1972). It also appears that *Zapple* is not applicable all year round but, "for all practical purposes," only during campaign periods. First Report, *supra* note 83, at 50. The FCC also has stated that if free time is given to supporters of a candidate, the same amount of free time must be given to his opponent's supporters, presumably in the non-exempt, non-news context. *Id.* at 49. Query as to the status of balancing free time in light of *Committee for Fair Broadcasting* and its litigation progeny. See *supra* notes 80-83 and accompanying text. The Commission has not clarified whether, if opposing spokesmen or supporters refuse or are unable to pay for response time under *Zapple*, traditional fairness principles require the licensee to present the other candidate's views free of charge, or whether there is an affirmative obligation to seek out spokesmen to present those views. If candidates are not to "subsidize" each other's campaigns per the *Zapple* doctrine, the logical extension of that doctrine would suggest that once the offer to respond to the paid time has been turned down by the opposing candidate, the licensee's obligations end in terms of balancing the views presented by the first candidate's spokesmen in their broadcast. The licensee, nonetheless, would have a continuing obligation to cover the campaign and contrasting sides per general fairness doctrine principles. But if *Zapple* is to parallel the equal time obligation in § 315, there should be no "seek out" requirement, since in the equal time context opposing candidates must contact the licensee to initiate equal time programming. 47 C.F.R. §§ 73.657(e) (1976) (TV); 73.120(e) (1976) (AM); 73.290(e) (1976) (FM); 73.590(e) (1976) (non-commercial educational FM).

According to the FCC¹¹² in *Committee for Fair Broadcasting*,¹¹³ the Larry O'Brien broadcast on behalf of the Democratic National Committee fell four-square under the requirements of *Zapple*, providing a "political party" corollary to that doctrine.¹¹⁴ O'Brien had spent only a few minutes addressing the Indo-China War issue, which had been the focus of the President's five "prime-time" addresses. Thus the O'Brien talk could not be considered "responsive" under the general fairness doctrine to the presidential addresses.¹¹⁵ CBS, said the Commission, should have taken steps to insure that O'Brien concentrated on the war issue to balance out the presidential discussion. Instead, the bulk of O'Brien's remarks had roamed over a variety of issues ranging from the environment to crime. O'Brien had criticized the Nixon administration's policies, and his comments were "party oriented" not "issue oriented."¹¹⁶

In the Commission's view this was a statement by a political party spokesman hoping to benefit his party's candidates, and the RNC as spokesmen for the opposing candidates, would have to be offered comparable time.¹¹⁷ CBS, which had broadcast the "Loyal Opposition" series to balance the Republican broadcasts with a Democratic viewpoint, ironically, was ordered to air more Republican programming. Its plea that the Commission's decision required an unreasonable and

112. In the 1974 Fairness Report the Commission reaffirmed the viability of the *Zapple* doctrine, although it refused to extend it to ballot propositions. 1974 Fairness Report, *supra* note 1, at 26,384, pars. 84-89. See also First Report, *supra* note 83, at 50 n.14. In the First Report the Commission, aside from reaffirming the *Zapple* doctrine, refused to codify it. *Id.* at 48-50.

113. 25 F.C.C.2d 283 (1970), *petition for reconsideration denied*, Republican National Committee, 25 F.C.C.2d 39 (1970), *rev'd sub nom.*, CBS v. FCC, 454 F.2d 1018 (D.C. Cir. 1971).

114. 25 F.C.C.2d 283, 743. Some cases indicate that the political party corollary actually began with the *Zapple* decision. See, e.g., Democratic National Committee v. FCC, 460 F.2d 891, 903 (D.C. Cir. 1972). Also see the suggestive language in *Zapple* itself: "(e.g., the chairman of the national committee of a major party purchases time to urge the election of his candidate, and his counterpart then requests free time for a program on behalf of his candidate)", which is set forth as an example of where free time need not be given. *Nicholas Zapple*, 23 F.C.C.2d 707, 708 (1970).

115. CBS v. FCC, 454 F.2d 1018, 1032 (D.C. Cir. 1971). See Democratic National Committee, 31 F.C.C.2d 708, 713 (1971), for a later case where a reply broadcast on the Indochina War was considered "responsive" because of network supervision over the issues discussed on the program. "When appearances by party spokesmen in response to Presidential appearances are clearly limited to those issues discussed by the President, the licensee is exercising its discretion under the fairness doctrine to choose appropriate spokesmen to discuss contrasting views on controversial issues of public importance." *Id.* at 713.

116. 25 F.C.C. 739, 745 (1970).

117. *Id.* at 743. No matter that the O'Brien speech was on July 7th, almost four months before the 1970 congressional elections, since, said the Commission, "electioneering" is a continuing process." *Id.*

unworkable "line-by-line" judgment of whether comments are party oriented or issue oriented was rejected.¹¹⁸

The Court of Appeals for the District of Columbia severely chastized the Commission for such circular reasoning. The Court, per Judge Skelly Wright, emphasized that CBS had offered O'Brien time in its "Loyal Opposition" series in an attempt to "achieve a balanced presentation of opposing opinions."¹¹⁹ After noting that the Commission's decision was inconsistent with one of its recent precedents,¹²⁰ the Court pointed out that the Commission had "shunned all reliance on the traditional balancing principles of the fairness doctrine" which afforded licensee "wide latitude."¹²¹ In essence, the Commission was providing the Republican Party with "two bites of the apple" with twice as much opportunity to influence public opinion as its critics had.¹²² The "irrational and arbitrary" decision was reversed.¹²³

By the time the Court of Appeals had reversed the Commission over a year after the RNC had filed its first petition demanding reply time, CBS had long since discontinued its "Loyal Opposition" series. The network, faced with the prospect of continually offering the Re-

118. *Id.* at 741, 745.

119. 454 F.2d 1018, 1020 (D.C. Cir. 1971).

120. Letter from FCC Chairman Rosel H. Hyde to Congressman Wayne L. Hays, February 9, 1968, FCC Reference No. 8830-S, C2-105, cited in 454 F.2d 1018, 1024 n.35 (1971). In the *Hays* situation, CBS had aired the Republican response to the Democratic President's State of the Union Address. CBS did not specify any issues which the Republicans had to cover, and a wide range was covered. The Commission rejected a Democratic request to reply to the Republican response, citing general fairness doctrine principles of licensee good faith and reasonableness. The Court, however, found unacceptable the Commission's failure to articulate its reasons for treating the similar *Committee for Fair Broadcasting* and *Hays* factual situations in different ways. This is not the only time that the District of Columbia Court of Appeals has forced the Commission to abide by its own precedent in the fairness area. See e.g., *Friends of the Earth v. FCC*, 449 F.2d 1164 (D.C. Cir. 1971).

121. 454 F.2d 1018, 1028 (D.C. Cir. 1971). The Court stated that in the fairness doctrine area there is "*carte blanche* licensee discretion." *Id.* at 1029. Although the court did not outrightly reject the FCC's "political party corollary" to the *Zapple* doctrine, it declared that the Commission had applied it to a distorted and wholly unreasonable view of the facts. The O'Brien broadcast had been responsive to issues raised by the President and his spokesmen. In claiming that O'Brien's presentation had been "unresponsive" to the President's Indochina War speech (see note 115 *supra*) the Commission arbitrarily excluded other issues that the President had addressed in broadcasts ranging from newscasts to press conferences, arbitrarily chose an eight-month period in which to analyze what issues had been presented, and arbitrarily ignored contrasting views aired by Republican spokesmen other than the President.

122. *Id.* at 1033.

123. *Id.* at 1034-35. The Court also rejected a last-minute shift in rationale offered by the Commission, i.e., that CBS had failed to dictate to the DNC the precise issues to be discussed in the O'Brien broadcast. This switch from a "responsiveness" to a "specification of issues" rationale, *id.* at 1033-34, was an unacceptable post hoc rationalization by appellate counsel, irrational, and raised serious first amendment problems.

publicans reply time as mandated by the FCC, and subject to intense political pressure,¹²⁴ put its dynamic program "in mothballs and hasn't been heard from since."¹²⁵ The FCC's excessive involvement in balancing contrasting viewpoints and its negating of the licensee's judgment, contributed to the elimination of a valuable source of contrasting viewpoints on issues of public importance.

The potential for FCC abuse in attempting to determine a reasonable fairness balance is further exemplified in a fairness complaint filed by the American Security Council Education Foundation (ASCEF) against CBS-TV in September, 1976.¹²⁶ The complaint had its genesis in a statistical analysis of CBS network news programming for 1972 and 1973. The analysis was sponsored and funded by the Institute for American Strategy (IAS), predecessor to ASCEF, and a staunchly anti-communist organization. A principle mission of the IAS was "to train leaders for the battle against Communism."¹²⁷ The complaint, updated with an examination of news, special, and documentary programming in 1975 and May 1976, charges CBS with "virtually boycotting views suggesting that the U.S. is losing or has lost military superiority to the Soviet Union and that a greater effort should be made to strengthen American defenses."¹²⁸

In *The Good Guys, the Bad Guys, and the First Amendment*, Fred Friendly perceptively analyzes the problems with the ASCEF complaint.¹²⁹ The IAS study itself was riddled with highly questionable methodological procedures, such as use of a floating center which resulted in categorizing programming in a biased manner, and reliance on secondary sources for determination of program content.¹³⁰ Even assuming the study were valid, the prospect of the FCC grappling with such an extensive statistical study is frightening. This is not the typical fairness situation where the FCC must examine alleged bias in a limited number of broadcasts, nor is it a situation where the Commission can find combined programming reasonably balanced upon a

124. F. FRIENDLY, *THE GOOD GUYS, THE BAD GUYS AND THE FIRST AMENDMENT* 127-33 (1976) [hereinafter cited as FRIENDLY].

125. Mickelson, *The First Amendment and Broadcast Journalism*, in *THE FIRST AMENDMENT AND THE NEWS MEDIA* (Final Report, Annual Chief Justice Earl Warren Conference on Advocacy in the United States) (sponsored by the Roscoe Pound - American Trial Lawyers Foundation) 57 (1973).

126. *CBS Charged With Undercovering Advocates of Military Power*, BROADCASTING, Sept. 13, 1976, at 28.

127. Levine, *Anti-Communist Group Lobbies to Keep U.S. a Military Superpower*, Wall St. J., Aug. 1, 1972, at 1, col. 1.

128. BROADCASTING, *supra* note 126, at 28.

129. FRIENDLY, *supra* note 124, at 188-89.

130. *Id.* at 167-91.

licensee's prima facie showing that various broadcasts presented contrasting viewpoints. Confronted with a documented study challenging every relevant news item, the Commission may be forced into a massive examination of programming content. As Friendly points out, the Federal Communications Commission must first determine what the controversial issue of public importance is for each of the hundreds of items coded in the ASCEF study, and there will be many subjective judgments involved, such as whether space mission coverage is a defense issue. The Commission will then have to assess whether each news snippet is pro, anti, neutral, or some other view on defense. Then, of course, there must be a judgment on total time ratios, frequency, and time of day for all of these items. Even this analysis can never determine the impact of "a single, two minute sequence of U.S. Marines using cigarette lighters to burn the huts in the villages of Cam Ne in 1965" in comparison with spoken editorials or second-hand news accounts.¹³¹ To be truly fair, all of CBS's programming for the four-year period would have to be analyzed, not just that set forth by ASCEF.¹³² The success of any such statistically based complaint would encourage other special interest groups, forever attempting to gain additional news coverage, to conduct their own studies and repeatedly involve the federal government, via the Federal Communications Commission, in second guessing the news judgments of broadcast journalists who must make decisions based on the news demands of each day.

X. *Fairness Doctrine Enforcement Problems*

Any discussion of response under the fairness doctrine would be incomplete without mentioning how the doctrine is enforced. The Federal Communications Commission does not enforce the fairness doctrine on its own initiative. It depends on complaints by the public.¹³³

131. *Id.* at 189.

132. Even before the ASCEF complaint was filed, CBS news was devoting an "enormous amount of time getting ready," with archivists, researchers, and producers reviewing past programming. According to Richard Salant, "we have to crawl through all our transcripts, all our broadcasts over two or three years, and you just stop dead with research." Interview with Richard Salant, President, CBS (Aug. 15, 1975) [hereinafter cited as Interview with Richard Salant].

133. In 1963 the FCC announced a major change in the way it would handle fairness doctrine complaints. Fairness complaints would be acted upon when they were received by the Commission, and not held for review every three years at license renewal time as had previously occurred. Honorable Oren Harris, 40 F.C.C. 582 (1963). The Commission informed the Congressman: "We have sought to process complaints as expeditiously as possible." *Id.* at 584. The Commission in the 1974 Fairness Report stood firmly behind the more than decade-old practice of ruling on complaints as they are made and not waiting until license renewal time. 1974 Fairness Report, *supra* note 1, at 26,378-79, pars. 46-48.

If someone believes that a licensee has presented only one side of a controversial issue of public importance, or has not presented any programming on a critical public issue, he must first complain to his local licensee.¹³⁴ In this way the broadcaster is provided an opportunity to "rectify the situation, comply with [the complainant's] request, or explain its position."¹³⁵ If the complainant either receives no reply from the licensee, or one he is dissatisfied with, a complaint may be made to the Commission. It should contain the following specific information:

- (1) The name of the station or network involved; (2) the controversial issue of public importance on which a view was presented; (3) the date and time of its broadcast; (4) the basis for your claim that the issue is controversial and of public importance; (5) an accurate summary of the view or views broadcast; (6) the basis for your claim that the station or network has not broadcast contrasting views on the issue or issues in its overall programming; and (7) whether the station or network has afforded, or has expressed the intention to afford, a reasonable opportunity for the presentation of contrasting viewpoints on that issue.¹³⁶

When a fairness complaint is received by the Commission, it is logged, then forwarded to a Broadcast Analyst at the Fairness/Political Branch, Complaints and Compliance Division of the Broadcast Bureau. The Analyst reviews each complaint, returning to complainants ones

134. Broadcast Procedure Manual, *supra* note 2, at 32,290, par. 13. In "unusual circumstances, complaints may be made directly to the Commission.

135. *Id.*

136. *Id.* In the Fairness Primer, "Interpretive Rulings — Commission Procedure," the Commission provided a checklist of only five items for a complaint: "Where complaint is made to the Commission, the Commission expects a complainant to submit specific information indicating (1) the particular station involved; (2) the particular issue of a controversial nature discussed over the air; (3) the date and time when the program was carried; (4) the basis for the claim that the station has presented only one side of the question; and (5) whether the station had afforded, or has plans to afford, an opportunity for the presentation of contrasting viewpoints." Fairness Primer, *supra* note 2, at 26,379, par. 50. It should be noted that the 1974 Fairness Report cites these 1964 Fairness Primer requirements in explaining what is required in complaints. 1974 Fairness Report, *supra* note 1, at 26,379, par. 50. The 1974 Fairness Report thus ignores the requirements mentioned in the 1972 Broadcast Procedure Manual, 37 Fed. Reg. 20,509 (1972), of stating the basis for the claim that an issue is controversial and of public importance and of providing an accurate summary of the view or views broadcast, as well as other wording referring to "network," "public importance," "overall programming" and a "reasonable opportunity." This additional information was included in both the 1972 Broadcast Procedure Manual, which predates the 1974 Fairness Report and the 1974 revised Broadcast Procedure Manual, *supra* note 2, which postdates the 1974 Fairness Report by less than two months. The Broadcast Procedure Manual's seven-point requirement may thus be considered authoritative. The FCC's citing of the 1964 Fairness Doctrine Primer's five-point complaint requirements and its failure to mention the Broadcast Procedure Manual's seven points in the 1974 Fairness Report must be seen as an oversight by the Commission which only adds confusion to an already difficult area.

which need additional information and passing those which contain the necessary information for lawyers on the Branch staff.¹³⁷ There is no enforcement distinction made between radio and television, and each complaint is evaluated on its own merits.¹³⁸

The legal staff may also return the complaint to a complainant for additional information, but if it decides that a *prima facie* fairness case has been made, a response to the complaint will be requested from the licensee. At this level, complainants and licensees have one more round to reply to each other's statements.

If the Commission decides against a licensee, a wide range of actions may be taken. A letter might be written to the licensee asking how he intends to comply with the doctrine or admonishing him for his behavior, and these letters will be entered in his file, potentially playing a part in license renewal decisions.¹³⁹ A license may be revoked during the term,¹⁴⁰ subject to a short term renewal¹⁴¹ or even to non-renewal,¹⁴² all of which involve costly hearings. Theoretically, forfeitures may also be imposed.¹⁴³ Whatever decision the staff makes

137. In 1975 there were five lawyers, one broadcast analyst, and two secretaries working in the Fairness Political Branch, which also handles § 315 equal time complaints and inquiries. Approximately 60% to 70% of personnel time was spent on fairness doctrine work, and a "ballpark figure" for the annual cost of the Branch's administering the doctrine in terms of salaries and other expenses was \$200,000. Others directly involved in fairness doctrine administration include the Chief and Assistant Chief of the Complaints and Compliance Division, the General Counsel's Office, and, of course, the Commissioners and their staffs. Generally, the Commission considered at least one fairness matter per week, and "there may be a hundred to a hundred and fifty fairness decisions" made each year. Interviews with Milton Gross, *supra* note 59.

138. *Id.*

139. *Id.* However, unless a fairness doctrine violation is alleged in a petition to deny or informal objection filed against a renewal application, if the violation has been partially remedied by a licensee it is not likely to play a role at renewal time. In fact, "[t]here are no questions on the new renewal forms which seek information concerning a station's policy with respect to the fairness doctrine. The Commission has found that such questions have rarely yielded useful information." Letter from Martin I. Levy, Chief, Broadcast Facilities Division, FCC Broadcast Bureau to Steven J. Simmons, (Dec. 8, 1976) (material relating to channel scarcity prepared under Levy's supervision, material relating to renewal process prepared under supervision of Richard J. Shiben, Chief Renewal and Transfer Division) [hereinafter cited as Levy Letter].

140. 47 U.S.C. § 312 (1970). An outright license revocation for fairness doctrine violations has never occurred.

141. 47 U.S.C. § 307 (1970). See *Springfield Television Broadcasting Corp.*, 28 F.C.C.2d 339 (1971); *Butte Broadcasting Co.*, 22 F.C.C.2d 7 (1970).

142. 47 U.S.C. § 307 (1970). The only instance of non-renewal of a license based in large part on fairness doctrine violations is *Brandywine-Main Line Radio*, 24 F.C.C.2d 18 (1970), *petition for reconsideration denied*, 27 F.C.C.2d 565 (1971), *aff'd* *Brandywine-Main Line Radio v. FCC*, 473 F.2d 16 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973).

143. This possibility is opened by considering the fairness doctrine to be part of the Communications Act, a codification suggested, albeit unevenly, in *Red Lion Broadcasting*

may be appealed to the full Commission,¹⁴⁴ and the Commission's decision to the courts.¹⁴⁵

Despite the wide range of sanctions available to the FCC, fairness enforcement is less than vigorous. Part of the reason is that a complainant has the burden of proof in making his case against a licensee, and of outlining the seven parts of his fairness complaint. If the seven-pronged *prima facie* case is not made, a licensee will not even have to respond to a complaint, much less disprove it. As stated in *Allen C. Phelps*,¹⁴⁶ the Commission will not require a licensee to produce "recordings or transcripts of all news programs, editorials, commentaries, and discussion of public issues" based upon "vague and general charges of unfairness."

Absent detailed and specific evidence of failure to comply with the requirements of the fairness doctrine, it would be unreasonable to require licensees specifically to disprove allegations. . . .¹⁴⁷

The "Phelps burden" is a heavy load to carry.

Demonstrating that a licensee has not presented contrasting views in his overall programming is a particularly difficult aspect of a com-

Co. v. FCC, 395 U.S. 367, 380-83, 385 (1969) and more clearly in *Straus Communications v. FCC*, 530 F.2d 1001, 1007, n.11 (D.C. Cir. 1976). Under 47 U.S.C. § 503(b) (1971), violators of the Act are subject to a \$1,000 fine per violation day, the total forfeiture not to exceed \$10,000. The FCC has to date refused to impose forfeitures for general fairness doctrine violations, emphasizing in its 1974 Fairness Report: "The danger of an unwise Commission decision in this area is considerably reduced by the fact that no sanction is imposed on the broadcaster for isolated fairness violations during the course of the license term. The licensee is simply asked to make an additional provision for the opposing point of view, and this is certainly not too much to ask of a licensee who has been found to be negligent in meeting his fairness obligations." 1974 Fairness Report, *supra* note 1, at 26,378, par. 45. It intends to continue this policy in the future. *Id.* Interview with Larry Secrest, Administrative Assistant to Chairman Richard Wiley (Sept. 4, 1975). According to Milton Gross, in a fairness doctrine case "the ordinary sanction would be either setting [licensees] for hearing on their renewal application or order to show cause or letters of admonition." But, "[i]t's quite possible that the licensee could be issued a forfeiture upon that part of the fairness doctrine contained in § 315. However, to date, no appropriate case has come before us It's quite feasible or possible that a case will arise where the Commission will find it appropriate to issue a forfeiture based upon a violation of the fairness doctrine" Interviews with Milton Gross, *supra* note 59. If considered part of the Act, cease and desist orders should also be available to remedy general fairness doctrine violations. 47 U.S.C. § 312(b) (1970). The FCC considers monetary forfeitures and cease and desist orders available for violation of the personal attack-political editorial obligations, since these have been made specific rules, unlike the general fairness doctrine responsibility.

144. 47 C.F.R. § 1.115 (1976).

145. 47 U.S.C. § 402(b) (1970).

146. 21 F.C.C.2d 12 (1969). According to Milton Gross: "Under our fairness doctrine policy, the burden is on the complainant to prove his case. How he does it is up to him. We have set forth certain guidelines in the Fairness Report" Interviews with Milton Gross, *supra* note 59.

147. 21 F.C.C.2d 12, 13 (1969).

plaint to prove. Since a licensee need not show a complainant transcripts of his public issue programming, theoretically a complainant would have to spend his waking hours for months and months monitoring a licensee's broadcasts to substantiate that no other view has been presented. Time after time complaints have been rejected for failing to establish imbalance in total programming. In the 1974 Fairness Report the Commission, for the first time, asserted that a complainant could make a valid claim about overall programming based solely on the "assertion that the complainant is a regular listener or viewer; that is, a person who consistently or as a matter of routine listens to the news, public affairs and other non-entertainment programs carried by the station involved."¹⁴⁸ However, the advantage to complainant from this policy change was diminished when the Commission in April 1976 asserted that if a licensee cites specific programming containing contrasting viewpoints, a complainant cannot rest on his bare statement of being a regular viewer.¹⁴⁹ Apparently what is required is a total monitoring of a licensee's programming by the complainant, which is nearly impossible since commercial licensees need not keep transcripts of their public issue programming.¹⁵⁰ Even if

148. 1974 Fairness Report, *supra* note 1, at 26,379, par. 52. The Commission continued: "This does not require that the complainant listen to or view the station 24 hours a day, seven days a week. One example of a 'regular' television viewer would be a person who routinely (but not necessarily every day) watches the evening news and a significant portion of the public affairs programs of a given station. In the case of radio, a regular listener would include a person, who as a matter of routine, listens to major representative segments of the station's news and public affairs programming. Also, the assumption that a station has failed to present an opposing viewpoint would be strengthened if several regular viewers or listeners join together in a statement that they have not heard a presentation of that viewpoint. Complainants should specify the nature and extent of their viewing or listening habits, and should indicate the period of time during which they have been regular members of the station's audience." *Id.* Another factor that is particularly difficult for a complainant to substantiate is whether an issue is a controversial issue of public importance. Among the items a complainant may point to are: degree of media coverage, attention from government officials and other community leaders, and impact on the community. 1974 Fairness Report, *supra* note 1, at 26,378. The precedent on this question is inconsistent, and severely lacking in explanatory rationale. See Simmons, *supra* note 40.

149. W. C. Ponder, 58 F.C.C.2d 1222 (Bur. 1976). In fact, the 1974 Fairness Report, whose guidelines were intended to clarify fairness obligations, thereby aiding complainants and licensees, may have hindered complainants. In explaining why the number of station inquiries decreased by more than half while the number of complainants increased more than tenfold in Fiscal Year (FY) 1976 as compared to FY 1975 and FY 1974, Milton Gross stated: "After the Fairness Report . . . the standards for proceeding on a complaint are fairly rigid. Unless a complaint makes a prima facie case, we do not go to the station. And the public has not come forward with prima facie complaints." Interviews with Milton Gross, *supra* note 59. Thus, although the 1974 Fairness Report's guidelines may provide help to a conscientious complainant, they also provide a clearer standard by which the Commission can reject complaints.

150. 1974 Fairness Report, *supra* note 1, at 26,379, par. 55. But the Commission

a complainant succeeds in proving that a licensee has violated the general fairness doctrine or personal attack rules, the Commission's decision on whether, and how, to sanction licensees has been unpredictable.¹⁵¹

Complainants may be further discouraged because the FCC has ruled that even though public complaint is the only way the doctrine is to be enforced, successful complainants are not entitled to reimbursement for attorney's fees.¹⁵² If a complainant decides to go it on his own, without legal help, he will find there are no easy complaint forms to fill out. Moreover, the Commission has not lived up to its promise to compile new fairness primers after the 1964 Primer effort.¹⁵³ All the Federal Communications Commission will mail the complainant is copies of such items as the 1974 Fairness Report in Federal Register format and jargon. If he goes to the case law for guidance he will find an inconsistent and vague set of precedents in almost all aspects of fairness doctrine administration.

The key substantive barrier to the success of a fairness complaint is the FCC's deference to a licensee's judgment. If a licensee's judgment can be said to be reasonable and/or in good faith, it will be upheld. No matter how reasonable the complaint's position is on what issue has been raised in a broadcast, whether the issue is controversial or of public importance, whether the balance in presentation is reasonable, if the licensee's judgment is contrary, but also reasonable, it will be upheld.

The lack of vigorous fairness enforcement can best be seen by examining complaint and ruling figures for the past few years.

As indicated in Charts 1 and 2, there has been an explosion of fairness doctrine complaints in the 1970's. In 1960 only 223 complaints or letters connected with fairness doctrine matters were received by the FCC.¹⁵⁴ By fiscal year (FY) 1969, the number of complaints had increased to 1,632. The complaint figures did not significantly change until FY 1973, when 2,406 complaints were received. By 1975, the figure 3,590 represented more than a 100% increase over the 1969 figure,

does "expect that licensees will be cognizant of the programming which has been presented on their stations. *Id.*

151. Compare *WIYN Radio*, 35 F.C.C.2d 175 (1972) with *Dr. John Gabler*, 40 F.C.C.2d 579, (Bur. 1973), *The Charlotte Observer*, 38 F.C.C.2d 522 (Bur. 1972), and *Straus Communications*, 51 F.C.C.2d 385 (1975).

152. *Georgia Power Project*, 53 F.C.C.2d 907 (1975).

153. *Fairness Doctrine Primer*, *supra* note 2, at 10,416, "Part I-Introduction."

154. In the 1950's there were but "a handful" of fairness complaints and rulings in any one year. Interviews with Milton Gross, *supra* note 59, and review of F.C.C. Reports and PIKE AND FISCHER, *RADIO REGULATIONS*, 1950 through 1960.

CHART NUMBER 1

Fairness Doctrine, Equal Time Statistics, FY's 1973-1976

FD=Fairness Doctrine
PA=Personal Attack
PE=Political Editorial
ET=Equal Time

No. of Sanctions¹

PE=Political Editorial ET=Equal Time	No. of			No. of										No. of Sanctions ¹																																																																																																																																																																																																																																																																																																																																																																																																	
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	No. of FD [†]	No. of ET	No. of Inquiries ³	No. of Complaints	No. of Complaints	No. of Complaints	No. of Complaints	No. of Complaints	No. of Complaints	No. of Complaints	No. of Complaints	No. of Complaints	No. of Complaints	No. of Complaints	No. of Complaints	No. of Complaints	No. of Complaints	No. of Complaints	No. of Complaints	No. of Complaints	No. of Complaints	No. of Complaints	No. of Complaints	No. of Complaints	No. of Complaints	No. of Complaints	No. of Complaints	No. of Complaints	No. of Complaints	No. of Complaints	No. of Complaints	No. of Complaints	No. of Complaints	No. of Complaints	No. of Complaints	No. of Complaints	No. of Complaints	No. of Complaints	No. of Complaints	No. of Complaints	No. of Complaints	No. of Complaints	No. of Complaints	No. of Complaints	No. of Complaints	No. of Complaints	No. of Complaints	No. of Complaints	No. of Complaints	No. of Complaints	No. of Complaints	No. of Complaints	No. of Complaints	No. of Complaints	No. of Complaints	No. of 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The above figures are based on interviews with Milton Gross, Chief, Fairness/Political Branch, Complaints and Compliance Division, Broadcast Bureau, F.C.C., on September 3, 9, 1975; December 8, 17, 1976, and a review of available statistics in the F.C.C. *Annual Reports*.

1. Only sanction totals were available. The F.C.C. Complaints and Compliance Branch does not keep a separate count for television, radio-AM, radio-FM.
2. Ordinarily, this involves a staff request to the licensee on how he proposes to comply with the fairness doctrine or equal time obligation, or a staff directive to the station to give more time to a particular view or candidate.
3. Ordinarily, inquiries involve requests from the public for more information about the fairness doctrine or equal time obligations.
4. Includes VHF and UHF television figures. Although the vast number of figures concern VHF TV, the Complaints and Compliance Branch does not keep a separate VHF-UHF count. There have been less than a dozen fairness complaints filed against cable system operators, and these are not included on the chart, interview with James A. Hudgens, Barry D. Umansky, F.C.C. Cable Television Bureau, September 11, 1975.
5. According to Milton Gross, interview, December 8, 1976, approximately 36,000 of these complaints concerned the show "Guns of Autumn" as well as requests for spokesmen to air views "combatting" sex and violence and on behalf of decency and morality on TV. Not one prima facie fairness doctrine case was made out of the 36,000 complaints.

* Station inquiry figures for FD and ET are combined, since the Complaints and Compliance Branch did not keep a separate count for these years. A large number of ET station inquiries were made and resolved by telephone and are not included since these figures are not available.

† Includes PA and PE statistics. Complaints and Compliance Branch does not keep a separate count.

CHART NUMBER 2

Fairness Doctrine, Equal Time Complaint Pattern Prior to FY 1973¹

Fiscal Year: 1972	Number of Complaints	
	Fairness Doctrine	Equal Time
Television ²	1,006	804
Radio: AM	506	462
Radio: FM	105	117
Total: 1972	1,617	1,383

Fiscal Year: 1971		
Television	714	585
Radio: AM	365	331
Radio: FM	45	25
Total: 1971	1,124	941

Fiscal Year: 1970		
Television	1,113	347
Radio: AM	562	204
Radio: FM	61	7
Total: 1970	1,736	558

Fiscal Year: 1969		
Television	911	221
Radio: AM	671	125
Radio: FM	50	20
Total: 1969	1,632	366

Calendar Year 1962 Total³ 850Calendar Year 1961 Total⁴ 409Calendar Year 1960 Total⁵ 233

Figures for Fiscal Years 1969-1972 are based on interviews with Milton Gross, Chief, Fairness/Political Branch, Complaints and Compliance Division, Broadcast Bureau, F.C.C., on September 3, 9, 1975; December 8, 17, 1976, and a review of available statistics in the F.C.C. *Annual Reports*. Sources for figures in Calendar Years 1960-1962 are indicated below.

1. The F.C.C. Complaints and Compliance Branch does not have station inquiry and adverse ruling figures compiled for prior to FY 1973, and they are not listed in the Commission's *Annual Reports*.
2. Includes VHF and UHF television figures. Although the vast number of figures concern VHF TV, the Complaints and Compliance Branch does not keep a separate VHF-UHF count. There have been less than a dozen fairness complaints filed against cable system operators, and these are not included on the chart, interview with James A. Hudgens, Barry D. Umansky, F.C.C.-Cable Television Bureau, September 11, 1975.
3. Statement of Hon. E. William Henry, Chairman, F.C.C., *Hearings, Subcommittee on Communications and Power, Committee on Interstate and Foreign Commerce, House of Representatives, on Broadcast Editorializing Practices*, 88th Cong., 1st Sess., July 16, 1963, at 88. An additional 2,200 complaints were received concerning the ABC Howard K. Smith program, "The Political Obituary of Richard M. Nixon." *id.*
4. 1962 F.C.C. *Annual Report* at 52. The Commission noted that the complaints,
 "divided into these general categories: slanted news programs (biased, etc.), 47; slanted news documentaries, 16; fluoridation, 105; communism, 56; "Medicare," 26; and miscellaneous controversial subjects, 159," *id.*
5. William Henry statement, *supra* 3, at 90.

and by FY 1976, the number had risen to 41,861 which represents over 2,500% more than the total 1969 complaints.

Particularly striking is the small number of complaints that result in station inquiries, much less rulings adverse to stations.¹⁵⁵ Thus in FY 1976, just over one-twentieth of 1% (approximately .057%) of all fairness complaints gave rise to station inquiries for a grand total of 24. There were only 16 adverse fairness rulings that year. In FY 1975 there were only 52 inquiries, or 1.4% of complaints, and only 10, or .28% of complaints, resulted in adverse rulings. If only general fairness doctrine rulings are considered, there was but one adverse ruling out of 3,590 complaints in FY 1975.¹⁵⁶ The situation was similar in FY 1974, with 1,874 complaints resulting in six (.32%) adverse rulings, and but one general fairness doctrine adverse ruling.

If the fiscal years 1973 through 1976 are combined, a total of 49,801 fairness complaints received by the Commission resulted in 244 station inquiries (.406% of complaints), 54 adverse rulings (.108% of complaints) and 16 general fairness doctrine rulings (.0321% of complaints). Of every 1,000 complaints received between FY's 1973 and 1976, approximately four resulted in station inquiries, one in an adverse ruling, and "1/3 of 1" in a general fairness adverse ruling. The average complainant truly had only a one in 1,000 chance.¹⁵⁷

The enforcement perspective is brought further into focus when one considers that during these years over 8,900 stations were broad-

155. However, Bill Monroe of NBC News notes: "If 150 stations received a complaint, they had to answer. Over a period of two years, this means 150 stations have had to answer to the government during the period without a single newspaper publisher having had to answer to the government. Station managers talk to each other. One station manager learns what the other station manager went through because he had the nerve to authorize a controversial editorial. So, the station manager that didn't even get a complaint from the FCC would like to avoid it, having heard the problem this fellow got into, because he had the nerve to try a controversial editorial. The whole industry is aware of the problem. If you're cited by the FCC for unfairness and asked to read-just the balance, and you've got the nerve to fight the FCC, the legal fees and the complexities of legal cases can build up. It might go to court, as in several noted cases, most recently the NBC pensions program, which hasn't necessarily run its course in the courts yet, but it's been through a number of courts and it's cost how many thousands of dollars? Even a network has to think twice about, are we going to get into another case like this, wouldn't it be easier to go along with the FCC, even though we disagree, and do something what we think journalistically is inhibiting to us" Interview with Bill Monroe (Sept. 12, 1975) [hereinafter cited as Interview with Bill Monroe].

156. As indicated *supra* note 1, the personal attack and political editorial rules are considered subcategories of the fairness doctrine. The FCC does not keep complaint, station inquiry, or adverse ruling statistics beyond those shown on Chart 1.

157. However, there is no way of telling how many insufficient complaints returned by the Commission staff resulted in the complainants contacting the stations and working out the fairness matter to their mutual satisfaction. A follow-up study of returned complaints would provide a fertile area for further research.

casting, and all were obligated to obey the fairness doctrine. The majority of these stations broadcast hundreds of hours each month, and tens of millions of people were reached each day. Surely one of the reasons that fewer than 50,000 complaints were received over a four-year period, and so few *prima facie* cases made, was the public's lack of awareness of the fairness doctrine obligations and available remedies.¹⁵⁸

Further, it should be emphasized that in terms of enforcement, the doctrine existed only as the part two balancing requirement. Only a handful of complaints were filed concerning part one of the doctrine, and in only one case, *Representative Patsy Mink*,¹⁵⁹ did the Commission rule against a station on a part one complaint. Despite the fact that the part one requirement had been continually stressed in Commission pronouncements since the early 1940's,¹⁶⁰ two out of six Federal Communications Commission Commissioners interviewed in the summer of 1975 did not even include the part one obligation when asked to define the fairness doctrine.¹⁶¹ Broadcasters have had their

158. According to Florence Kiser, Broadcast Analyst for the Political/Fairness Branch of Complaints and Compliance, Broadcast Bureau, FCC, who initially reviews all incoming fairness complaints, the "first and foremost" reason why complaints are returned to complainants as inadequate is the failure of complainants to indicate that they have contacted the involved station prior to complaining to the FCC. Another major problem is that the complainants are often "vague . . . in what they are complaining about. They will say there's too much broadcasting against gun ownership, but they don't give us any program or any reason — they just say it's too much, or there's too much sex on television, or there's too much anti-abortion, without giving us any specific program." Interview with Florence Kiser, Broadcast Analyst, Political/Fairness Branch of Complaints and Compliance, Broadcast Bureau, FCC (Sept. 9, 1975). The FCC has never required broadcasters to air messages telling the public about the fairness obligation and how fairness complaints can be made.

159. 59 F.C.C.2d 987 (1976). Since 1970 the FCC has developed a double standard further insulating licensees from part one fairness doctrine complaints. Under this double standard, an issue that might require balancing under part two of the doctrine because it is a controversial issue of public importance need not necessarily have been aired initially under part one of the doctrine. The Commission has declared that issues which *must* be covered under part one must be both of greater importance and more controversial than issues which simply must be balanced under part two. Such part one issues must be "vital" (*id.* at 994), with a "tremendous impact within the local service area," (*id.* at 977) such as strip mining in West Virginia in *Patsy Mink*. See also *Friends of the Earth*, 24 F.C.C.2d 743, 750 (1970), *rev'd on other grounds*, *Friends of the Earth v. FCC*, 449 F.2d 1164 (D.C. Cir. 1971); 1974 Fairness Report, *supra* note 1, at 26,375-76, pars. 23-25; Public Communication, Inc., 49 F.C.C.2d 27 (Bur. 1974), *application for review denied*, 50 F.C.C.2d 395 (1974); Council on Children, Media and Merchandising, 59 F.C.C.2d 448 (Bur. 1976).

160. See *Mayflower Broadcasting*, 8 F.C.C. 333 (1941); *United Broadcasting*, 10 F.C.C. 515 (1945); 1974 Fairness Report, *supra* note 1, at 26,375.

161. The interviews were conducted at the Commission offices in Washington, D.C. between Sept. 3, and Sept. 16, 1975. An interview could not be arranged with Abbott Washburn, who had not yet been confirmed by the United States Senate.

licenses renewed after having broadcast little or no public issue programming.¹⁶²

XI. *Potential for Abuse — A Delicate Line*

Traditionally, the first amendment has kept government from interfering with the workings of the media. Thus, government restraints on a newspaper's publication plans,¹⁶³ government imposition of libel judgments on a major daily newspaper,¹⁶⁴ and a government licensing scheme for films,¹⁶⁵ have all been struck down as incompatible with first amendment guarantees.

The first amendment's relationship to the broadcast media, however, has been different. In the famous *Red Lion* case,¹⁶⁶ the Supreme Court placed the broadcast press in a special category. Broadcasters' special treatment was due to the exclusive privilege they are accorded by the government to use a scarce airwave frequency which is "owned" by the public. In light of their powerful monopoly of this scarce public resource, the government was justified in imposing greater restrictions on the broadcast press in order to fulfill the first amendment need of the American people for a diverse supply of information about important public issues. The fairness doctrine and the personal attack and political editorial rules, government policies that would not have been tolerated if imposed on the printed press,¹⁶⁷ were compatible with the first amendment when applied to the broadcast press.

The scarcity rationale suggested by the Court is open to serious question.¹⁶⁸ If scarcity is viewed as a measure of excluding those who want to broadcast from use of a frequency, it must be noted that there are radio and television frequencies unused and available. FM radio

162. See, e.g., *Renewal of Standard Broadcast Station Licenses*, 7 F.C.C.2d 122 (1967); *Renewal of Standard Broadcast and Television Licenses for Oklahoma, Kansas, and Nebraska*, 14 F.C.C.2d 2 (1968); *Herman C. Hall*, 11 F.C.C.2d 344 (1968); *Broadcast Licenses for Arkansas, Louisiana, and Mississippi*, 42 F.C.C.2d 3 (1973).

163. *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Near v. Minnesota*, 283 U.S. 697 (1931).

164. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

165. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

166. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

167. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

168. As is the concept that since the public "owns" the airwaves, this justifies content control. Does public ownership of forests from which trees are cut to make newsprint mean that the government can control the content of newspapers? Are speeches at outdoor rallies somehow subject to government direction because the "airwaves" are used? Indeed, are conversations on one's back porch subject to federal control due to vocal chord generation of a publicly-owned resource? Drawn to its extreme, the ownership rationale raises fundamental and troubling questions.

and UHF television are fully subject to the fairness doctrine. According to Martin Levy, Chief of the Federal Communications Commission's Broadcast Facilities Division,

With respect to FM, there are currently 876 'vacant' channel assignments, 237 of which have been applied for. . . . In the top 25 markets . . . there are a total of 34 commercial and 12 educational UHF channels available.¹⁶⁹

Even VHF television and AM radio frequencies are available in some areas of the country.¹⁷⁰

If scarcity is seen in terms of a comparison of the number of daily newspapers with the number of broadcast licensees the "scarce" licensees outnumber the newspapers by more than four to one.¹⁷¹

If scarcity is considered on a local level, all large metropolitan areas have far more broadcast outlets than daily newspapers. Los Angeles, for example, has over fifty broadcasters but only three major daily newspapers.¹⁷² With the growth of cable television, scarcity will truly be a thing of the past.¹⁷³

Despite this weakness in a key underpinning of the doctrine,¹⁷⁴ recently the Court resoundingly affirmed its constitutionality.¹⁷⁵ How-

169. Levy Letter, *supra* note 139. However, Mr. Levy did not comment on the continued viability of the fairness doctrine, and the frequency figures he supplied should not be construed as a reflection of his views on the doctrine.

170. However, in both major and intermediate markets available "vacant" frequencies for AM radio and VHF television are hard to come by. "The only VHF channel in the top 25 markets which can presently be applied for is an educational allocation in the Dallas-Fort Worth market There is no easy way to estimate the number of additional stations that can ultimately be accommodated in the AM band . . . it is apparent that little, if any, further expansion is possible in major and intermediate markets." Levy Letter, *supra* note 139. It should be noted that frequencies that are not "vacant" but which are utilized by a licensee may be obtained in connection with the sale of a station's facilities. In 1975, 363 radio stations and 22 TV stations changed hands. 1976 BROADCASTING YEARBOOK A-52.

171. According to FCC tabulations, as of Sept. 30, 1976, there were a total of 8,077 licensed radio stations and 932 licensed TV stations, or a total of 9,009 broadcast licensees. BROADCASTING, Dec. 13, 1976 at 77. As of Jan. 1, 1971 there were 1,749 daily newspapers in the United States.

172. 1976 BROADCASTING YEARBOOK B-41, C-19, 20.

173. See Simmons, *The Fairness Doctrine and Cable TV*, 11 HARV. J. LEGIS. 629 (1974).

174. The Court has not yet fully worked out another constitutional rationale. Factors that might be considered in developing such a rationale include the intrusive and "captivity" nature of television, the power of a network to reach a vast audience, the obligation to provide time to others as a condition of receiving a valuable license relatively free of charge, the ability of the government to cause citizens of all ages to be exposed to vital public educational information, as it also causes young citizens to attend school and be exposed to a school curriculum, and the economic monopoly generated from government action.

175. *CBS v. Democratic National Committee*, 412 U.S. 94 (1973).

ever, in affirming the doctrine, the Court has been careful to recognize that broadcasters have first amendment rights which merit protection,¹⁷⁶ and that the public interest is best served by the maintenance of a delicate balance between the first amendment interests of broadcasters in keeping some degree of editorial control over their public issue programming, and the public's first amendment need for diverse public affairs information. As expressed by the Court of Appeals for the District of Columbia:

The essential task of the fairness doctrine is to harmonize the freedom of the broadcaster and the right of the public to be informed. . . . The salutary intent of the fairness doctrine must be reconciled with the tradition against inhibition of the journalists' freedom. That tradition, which exerts a powerful countervailing force, is rooted in the constitutional guarantee that has vitality for broadcast journalists, though not in exactly the same degree as for their brethren of the printed word. . . . In construing the fairness doctrine, both the Commission and the courts have proceeded carefully, mindful of the need for harmonizing these often conflicting considerations.¹⁷⁷

Keeping in mind the need to respect broadcast journalists' rights as well as the public need to know, one must recognize the great potential for abuse and counterproductivity in fairness doctrine administration.¹⁷⁸ Under part two of the doctrine, presentation of one side of a controversial public issue requires presentation of a contrasting side. A spokesman for the contrasting side must be given free air time if he does not want to pay for it, inflicting financial loss on the broadcaster.¹⁷⁹ Any serious fairness doctrine complaint may cost a licensee dearly in litigation and other expenses, as well as in staff time. One network recently paid well over \$100,000 in legal expenses and thou-

176. *Id.* at 116-18.

177. *National Broadcasting Co. v. FCC*, 516 F.2d 1101, 1110-11 (1974). Judge Tamm stated that "[p]roperly understood, the fairness doctrine is a balancing influence between the public's right of access to the broadcast media and the right of licensees to transmit their own message." *Id.* at 1192. (Tamm, J., concurring in support of the order). According to Chief Justice Burger, the "role of the Government as an 'over-seer' and ultimate arbiter and guardian of the public interest and the role of the licensee as a journalistic 'free agent' call for a delicate balancing of competing interests. The maintenance of this balance for more than 40 years has called on both the regulators and the licensees to walk a 'tightrope' to preserve the First Amendment values written into the Radio Act and its successor, the Communications Act." *CBS v. Democratic National Committee*, 412 U.S. 94, 117 (1973) (Burger, C.J., concurring).

178. This potential is acknowledged by the FCC: "We recognize, however, that there exists within the framework of fairness doctrine administration and enforcement the potential for undue governmental interference in the processes of broadcast journalism, and the concomitant diminution of the broadcaster's and the public's legitimate First Amendment interest." 1974 Fairness Report, *supra* note 1, at 26,374.

179. See note 21, *supra*.

sands of hours in personnel time fighting a fairness complaint which it eventually won,¹⁸⁰ and a local licensee paid over \$20,000 in legal expenses and 480 personnel hours to win another fairness attack.¹⁸¹

The unprofitable nature of most controversial issue programming is a disincentive to its airing. Licensees, especially less profitable ones, cannot help but be discouraged from presenting this type of broadcast when the potential fairness doctrine costs are considered. CBS's experience with the "Loyal Opposition" series and the *Committee for Fair Broadcasting* case has been previously noted. If one considers the implications of the ASCEF complaint, also mentioned above, the disincentive possibilities are vastly expanded.

Bill Monroe, veteran NBC broadcast journalist, pointedly summed up the disincentive effect of part two as follows:

Every time a letter goes out from the FCC, the manager of the station has a little chill go through him, he's gotten a letter from a government agency that could conceivably put him out of business. It doesn't make any difference that they don't often do it, because in broadcasting you know they can do it. And boy, you respond to these people. When the manager gets the letter, he has to cancel a number of appointments he's made for the next few days, talk to the producer of the possibly-offending program, make sure that all of the research of the program is gone through by him or the manager himself or some other assistant, so that he has a check on the producer. The producer's work has to be completely gone through all over again, by somebody operating for the manager to double check the producer, and they've got to go through a lot of things the producer left out of the program. They've got to talk to lawyers in their home town and in Washington, and put together a careful document to go to the FCC in the hopes that the program was fair, and usually it is.

But when the manager gets through the process, he is likely to tell that producer to stay away from controversial subjects for the next three or six months so he doesn't have to go through this again. He winds up, even if the FCC sends him back a letter saying, "your program was okay, forget about it, you made a good answer," he winds up having been hassled by the government because he committed the sin of telling a producer to go ahead and tackle this

180. *Accuracy in Media, Inc.*, 40 F.C.C.2d 958 (Bur. 1973), *application for review denied*, 44 F.C.C.2d 1027 (1973), *reversed*, but then *reversal vacated and case remanded with direction to vacate order and dismiss complaint*, *National Broadcasting Co. v. FCC*, 516 F.2d 1101 (D.C. Cir. 1974) *cert. denied*, 424 U.S. 910 (1976). NBC personnel and legal expense estimates were supplied in an interview with Marshall Wellborn, NBC Assistant General Attorney and Russell Tornabene, NBC Public Relations (Aug. 26, 1975).

181. GELLER, *supra* note 91, at 40-43 app. E.

tough subject. No newspaper publisher is answerable on this basis.¹⁸²

The Supreme Court itself has explicitly recognized the inhibiting effect of government-imposed rights of reply. In striking down as unconstitutional a Florida law requiring a newspaper to grant equal space to political candidates whom the newspaper had editorially attacked, the Court noted that the law penalized print journalists because of the (1) additional printing costs, composing time and materials necessary to print the reply, and (2) the required use of space which the newspaper may have preferred to use for another topic for the reply.¹⁸³ The Court concluded:

Faced with [these] penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy. Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced.¹⁸⁴

Compared to the newspaper situation, the "broadcast costs" are far greater for a licensee who must devote expensive programming seconds to fairness replies. The licensee also must suffer loss of composing time and materials in filming or taping reply spokesmen, and the licensee may well want to devote his programming time to other material. While the Florida reply statute was limited solely to political candidates engaged in seeking a nomination or election,¹⁸⁵ the fairness doctrine applies to all controversial public issues, whether or not they are the subject of an election. If the Florida statute in *Miami Herald* was inhibitory with respect to newspapers, the fairness doctrine part two requirement may be seen as even more inhibitory to broadcast licensees.

One might contend that the fairness doctrine part two requirement,

182. Interview with Bill Monroe, *supra* note 155.

183. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974).

184. *Id.* at 257. The Court continues, "Government-enforced right of access inescapably 'dampens the vigor and limits the variety of public debate.'" *Id.*

185. FLA. STAT. § 104.38 (1973). The statute reads as follows: "§ 104.38 *Newspaper assailing candidate in an election; space for reply* — If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provision of this section shall be guilty of a misdemeanor of the first degree, punishable as provided in § 775.082 or § 775.083."

as administered by the FCC, affords licensees so much discretion under the good faith reasonableness standard and is enforced with such lackluster that it cannot possibly be a disincentive to coverage of controversial public issues. Such an argument has a good deal of force. However, the part two requirement is certainly perceived by many broadcasters as being inhibitory, which is likely to be an important factor in their programming decisions.¹⁸⁶ The requirement has undeniably imposed great costs on broadcasters when it has been enforced. The Supreme Court recognized the inhibitory effect of a similar, but even less strenuously enforced Florida statute applicable to newspapers.¹⁸⁷ If the doctrine were enforced with any degree of vigor, as one would expect a congressionally mandated policy to be, the inhibitory effect would be greatly magnified. But at the bottom line, if the doctrine is so rarely enforced that licensees have virtually complete freedom under it, one must question why the doctrine, with an enormous abuse potential, should exist at all.

Fairness doctrine entanglement may take on an even more ominous aspect. By influencing the FCC's decision-making process, the government itself may abuse the doctrine through imposition of its own interpretation of what issue has been raised in a particular broadcast, whether that issue is controversial and of public importance and what is a reasonable opportunity to respond. Just such an activity was contemplated by the Nixon Administration. To meet the concerns of President Nixon and his Chief of Staff, H. R. Haldeman, about "unfair coverage" over the broadcast media, White House Aide Jeb Stuart Magruder proposed "an official monitoring system through the Federal Communications Commission" to prove broadcaster bias as soon as Republican Dean Burch was "officially on board as chairman."¹⁸⁸ In at least

186. See F. Wolf, TELEVISION PROGRAMMING FOR NEWS AND PUBLIC AFFAIRS 77 (1972); *ABC Took Strict View of Fairness Doctrine in Its Cavett Ruling*, Wall St. J., March 11, 1974, at 14, cols. 4-5. In any month there may well be a BROADCASTING editorial lambasting the fairness doctrine. In personal interviews broadcast journalists have stressed the first amendment chill generated by the fairness doctrine. See, e.g., Interview with Bill Monroe, *supra* note 155; Interview with Richard Salant, *supra* note 132.

187. The Florida statute in *Miami Herald* was enacted in 1913, and the 1974 Supreme Court decision was only the second ever decided under its provisions. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

188. "Memorandum For: H. R. Haldeman, From J. S. Magruder, Re: The Shot-gun versus the Rifle," Oct. 17, 1969, reprinted in Bazelon, *FCC Regulation of the Telecommunications Press*, 1975 DUKE L. J. 213, 247-48, app. B. In the Memorandum, Magruder also lists seven specific requests that the President made in less than a 30-day period for staff action to counter broadcast coverage, such as, "President's request that you take appropriate action to counter biased TV coverage of the Adm. over the summer. (Log 1644) CONFIDENTIAL." *Id.* at 249. It should be stressed that no evidence

one instance, the Nixon Administration acted on its own, superseding the Federal Communications Commission, and deliberately misinformed the three commercial television networks of their fairness obligations in order to bias their coverage toward the President's point of view.¹⁸⁹

The government may also abuse the fairness doctrine from the bottom of the enforcement ladder, i.e., by complaining to local stations and to the Commission about local station programming. According to one author, this type of abuse is not mere fantasy. He alleges a massive fairness doctrine campaign on behalf of the Kennedy and Johnson Administration against conservative programming aired by local licensees.¹⁹⁰ Prior to the 1964 Johnson-Goldwater election, the Democrats "decided to use the fairness doctrine to harass the extreme right" Utilizing a front group with secret Democratic funding, a national campaign was organized in which 1,035 letters were written to local stations, producing a total of 1,678 hours of free time to respond to right wing commentators. One key Democratic organizer declared, "Even more important than the free radio time was the effectiveness of this operation in inhibiting the political activity of these right wing broadcasts," and inhibiting the stations from broadcasting more "politically partisan programs." He concluded that most of these stations are "small rural stations . . . in desperate need of broadcast revenues Were our efforts continued . . . many of these stations . . . would start dropping the programs from their broadcast schedule."¹⁹¹ Democratic liberals may applaud the silencing or inhibiting of right wing

has been revealed which indicates that Chairman Burch participated in such a "monitoring" scheme. For a decision that was subject to at least charges of political motivation, see Committee for Fair Broadcasting, 25 F.C.C.2d 283 (1970), Letter to Wayne Hays, Feb. 9, 1968, F.C.C. Reference No. 8830-5, C2-105, cited in 454 F.2d 1108, 1024. See note 120, *supra*. See also CBS v. FCC, 454 F.2d 1018, 1035-36 (1971) (Tamm, J., concurring). NBC broadcast journalist Bill Monroe has stated: "Our impression was that the Nixon administration . . . would, in some cases, withhold spokesmen from their side in order to play the issue down in the hopes that this would result in the broadcaster feeling that rather than present an unbalanced program, he would have to go away from the subject altogether." Interview with Bill Monroe, *supra* note 155.

189. "Memorandum for H. R. Haldeman, from Chuck Colson" Bazelon, *supra* note 188, at 244 app. A.

190. See FRIENDLY, *supra* note 124, 32-42. Friendly alleges that even the Red Lion litigation may have been begun as part of this Democratic fairness campaign. According to Friendly, Fred Cook, the complainant in the case, worked closely with the Democratic National Committee and "may have been unwittingly manipulated." *Id.* at 42.

191. *Id.* at 41-42. Friendly also alleges that the Kennedy Administration was involved in a 1963 national fairness doctrine campaign to aid passage of the nuclear test ban treaty by providing pro-treaty viewpoints over the air to counteract broadcasters with contrasting views. *Id.* at 34.

broadcasters, but they must remember that in another day and time such a doctrine may be used to silence their own viewpoints, as the Nixon episode suggests.

It is true that part one of the doctrine may be used to force broadcasters to cover controversial public issues, counteracting the inhibitory effect of the part two balancing requirements. Thus, in *Representative Patsy Mink*, West Virginia Radio station WHAR was told that it had failed adequately to cover the critical issue of strip mining and was in violation of its part one obligation.¹⁹² But such a governmental involvement in the broadcast press represents an even more severe first amendment infringement than part two involvement. In the part two situation, the licensee has at least chosen the issue which needs coverage, and the FCC then merely tells the licensee to air additional programming on that issue. But in the part one situation the licensee may have decided not to cover an issue because of other pressing stories, an editorial judgment about the issue's worth, or any number of reasons. His initial discretion is negated by direct FCC involvement. Such government instruction to the broadcast press to cover issues the government deems important is inappropriate in a society attempting to maintain a free press. The Nixon, Johnson, and Kennedy abuses of part two of the doctrine pale in comparison to the potential abuse of part one by any administration inclined to do so. The administrative difficulties involved in active part one enforcement threaten severe first amendment infringement. How is a broadcast journalist to know which issues need coverage?¹⁹³ How is he to define those issues? Such questions which defy any concrete, consistent solution, would leave broadcast editors constantly guessing about how best to arrange the content of their public issue programming. An active part one enforcement would leave the public unduly influenced by government intervention in its daily information diet.

XII. *The Unfairness Doctrine*

One is forced to conclude, after close scrutiny of the fairness doctrine, that in actuality it is an "unfairness doctrine." It is unfair to the public, because although it promises to induce additional public issue coverage, including contrasting views, it does not do so. The doctrine has been so little enforced, the precedent is so inconsistent and vague, and licensees are afforded so much discretion, that fairness complainants are not likely to succeed in proving a case. The doctrine does not

192. 59 F.C.C.2d 987 (1976).

193. See *supra* note 159.

make any substantial contribution to increasing public issue debate over the airwaves, and in fact, the part two requirement may actually discourage such debate. Any governmental use of the doctrine which limits broadcast journalists' freedom, in turn distorts the issue coverage received by the American people. The doctrine, theoretically geared to informing the American people fairly, may actually generate misinformation. When the doctrine is "legitimately" enforced, the presentation of contrasting views may be long after the initial broadcast, and a substantially different audience may still hear a viewpoint on only one side of an issue. There will be no "fairness" in the sense that each member of the public hears contrasting views on every issue.

The doctrine is also unfair to broadcast licensees. When the doctrine has been enforced, especially in the part one context, it has caused severe interference with the editorial judgments of the broadcast press, and it has been extremely expensive for licensees to react to fairness complaints. The money spent and personnel utilized to defend against fairness complaints could be better used to produce public issue programming. Such expenditures, occasional as they may be, act as a disincentive to airing such programming. If the doctrine were vigorously enforced with intensive FCC involvement, as some public interest groups suggest, the disincentive would be even greater. The potential for abuse of the doctrine by Presidents, political parties, or any powerful interest group is enormous. Broadcast licensees see their print media brethren, completely free of government interference, and rightfully question why their own editorial judgments are so open to FCC interference. Even if a licensee wants to obey the doctrine, the guidelines are as difficult for him to follow as they are for a public complainant.

Groups seeking access to the broadcast media are also treated unfairly under the doctrine. They may be denied an opportunity to respond to a licensee editorial even though the contrasting view they want to air has been given far less coverage and in a comparatively unfavorable time slot. If they are granted an opportunity to respond to a licensee's views, they may be permitted to speak many months after the relevant issue is moot, and the issues with which they are concerned may be given little attention by licensees. Yet fairness doctrine complaints do little to increase public issue coverage.

Finally, the FCC has put itself in an unfair position by its handling of the fairness doctrine. It quite rightly has been concerned about the freedom of broadcast licensees and has avoided a vigorous enforcement pattern, but such a policy has opened the Commission up to legitimate

and severe criticism for failing to increase diverse public issue coverage over the nation's airwaves. However, when the Commission does get involved on a complaint-by-complaint basis, it often interferes with a broadcaster's editorial judgment violating its own self-professed healthy concern for broadcasters' first amendment rights. The Commission's inconsistent and vague rulings have been in large part due to its own faulty decision-making. But it has a hard road to travel, and in balancing competing interests it is, in a sense, damned if it does and damned if it does not enforce a fairness complaint. The doctrine also raises the possibility of the Commission being used as an instrument by political or private groups to harass broadcast spokesmen and impose their own points of view on the American people.

***Conclusion: Dropping Part Two, Enforcing
Part One Differently***

What should be done about the "unfairness doctrine"? The long term answer to this question is to increase the number of electronic communications outlets available to the American people.¹⁹⁴ The Federal Communications Commission and the Congress must do far more than they have to promote the growth of cable television, UHF television, additional VHF channels, and additional networks. Public television must be given expanded and more permanent funding. The House Communications Subcommittee has begun an intensive review of the 1934 Communications Act,¹⁹⁵ and the study will provide an excellent chance for the Congress to address these areas. With an abundance of communications outlets, especially with cable's huge

194. Indeed, in light of the availability of FM radio and UHF television frequencies in many markets, and the abundance of existing AM and FM radio stations in major market areas, an argument can be made for elimination of fairness doctrine obligations for these UHF and radio media outlets. See Chairman Wiley's proposal to deregulate radio in certain major markets in *A Determined FCC is Setting New Course for Industry on Fairness and Equal Time*, BROADCASTING, Sept. 22, 1975, at 22-34. The Commission has decided not to proceed with the proposal "at this time." Fairness Report Reconsideration, *supra* note 1, at 699 n.1. A major reason for the FCC's decision was concern with the legal authority of the Commission to take such a step in light of the 1959 amendment incorporating the fairness doctrine as applicable to each licensee. *Id.* at 702 (Commissioner Hooks, concurring). At the end of a research interview and prior to making his fairness deregulation proposal, Chairman Wiley asked the author his opinion of the proposal. When the statutory problems were pointed out, the Chairman immediately and perceptively acknowledged these problems. Interview with Richard Wiley, Chairman, FCC (Sept. 8, 1975).

195. *Thoughts of the Chairman on Rewrite of 1934 Act*, BROADCASTING, Nov. 22, 1976 at 20. The House study also provides a good opportunity to consider short-term improvements on the "unfairness doctrine," such as those discussed below. Indeed, the fairness doctrine will be carefully considered by the Subcommittee. Interview with Chip Shooshan, Counsel, House Communications Subcommittee (Oct. 25, 1976). [See also introductory remarks by Rep. Lionel Van Deerlin, this issue. *Ed.*]

channel capacity, there will be no scarcity of electronic media opportunities, even in major markets. Interest groups will have a variety of access options in presenting their views to the public. Diversity of opinion should develop inherently from the diversity of information sources, and public issues inevitably will be given coverage on a variety of channels. There will be no need nor justification for government influence on the selection of issues to be covered and in what way they should be covered.

But what about the immediate future? What should be done right now to cope with the problems generated by the "unfairness doctrine"? There is no easy answer. There is no perfect scheme. Competing arguments have a good deal of force, but one policy option that would at least be an improvement over the present structure is to drop the part two balancing requirements for all public issue programming except station editorials, and enforce the part one requirement only in terms of minimum percentages of time for public issue broadcasts and programming to meet ascertained community needs.

A great many broadcast licensees explicitly editorialize on a variety of issues,¹⁹⁶ and are encouraged to do so by the FCC.¹⁹⁷ In such situations, the licensee is utilizing his exclusive frequency to urge viewers to adopt his point of view. There is no pretense of journalistic fairness, as in a news story. The licensee's purpose is to bias the viewer to his viewpoint, and the issue is usually easier to identify in such editorials than in news documentaries. In editorials the licensee has chosen to cover an issue directly, and an enforced reply opportunity does not involve the part one infringement where issue coverage is mandated, nor even the kind of part two interference involved in editorial judgments on news, documentary, or panel shows. Replies to such editorials are an easily facilitated access opportunity for community groups, and there are indications that many broadcast journalists do not object to mandated reply opportunities to station editorials.¹⁹⁸

196. "65% of AM stations, 54% of FM stations, and 58% of TV stations are now editorializing at least occasionally." 1976 BROADCASTING YEARBOOK C-300.

197. Editorializing Report, *supra* note 1, at 1254, par. 16; Report and Statement of Policy Re: Commission en banc Programming Inquiry, 44 F.C.C. 2303, 2314 (1960) [hereinafter cited as Programming Report].

198. Interview with Richard N. Hughes, President, National Broadcasting Editorial Association (Aug. 27, 1975) and Letter from Richard N. Hughes to Chairman Richard Wiley (Aug. 20, 1975). The disincentive to air editorials resulting from the balancing obligations would be mitigated by the requirement to air a minimum percentage of public issue programming, including local public issues, and programming responsive to ascertained needs, as discussed below. Editorials could be offered in fulfillment of these requirements. Licensees' desire to directly air their views would also act as a mitigating factor.

For reasons such as these, a part two response requirement if it makes sense at all, is most appropriate in this broadcast editorial situation. But to be effective, the FCC must be much more consistent and rational in enforcing the reply obligation. Intensive license efforts, besides over-the-air announcements, should be required to find reply spokesmen to editorials.¹⁹⁹ A reply broadcast should occur no later than 45 days after the original broadcast and in the same time period²⁰⁰ so that it can make a more meaningful contribution to ongoing debate and so more of the original audience will be likely to see the later reply. The same format should be offered the reply spokesman. If only one editorial is broadcast, the reply spokesman should be offered at least roughly the same amount of total time. If numerous editorials are involved, frequency of broadcast and time of broadcast must consistently be given proper attention.²⁰¹ With clear guidelines, the FCC enforcement could be swift, consistent, effective, and limited to the more manageable explicit editorial area.

Most stations that editorialize would ordinarily provide such fair response opportunities for opposing spokesmen on their own initiative. But such guidelines would insure fair treatment for reply speakers on all broadcast outlets, access opportunities to a variety of public interest groups, and a better opportunity for the public to receive diverse views on certain issues in timely fashion.²⁰² At the same time, broad-

199. Licensees should be familiar with community leaders as a result of their ascertainment efforts. If over-the-air announcements do not produce reply speakers acceptable to the licensee, these leaders or other parties involved with the issue may be contacted. Letters may be written to appropriate institutions or organizations. Licensees should undertake response recruitment efforts at the very least similar to those required if a reply spokesman is rejected by a licensee. See *supra* notes 33-34 and accompanying text.

200. Perhaps within an hour before or after the original broadcast. Thus, if an editorial were broadcast at 6:00 p.m., a reply could be aired anywhere between 5:00 and 7:00 p.m. on another evening. Another possibly more manageable alternative is to require that prime time editorials be balanced with prime time replies.

201. The FCC might regard certain balance ratios as inherently suspect. A frequency ratio of greater than three-to-one might be so regarded. This would require the licensee to rebut the presumption that his balance is unreasonable by demonstrating that the total time balance is significantly skewed the other way (*i.e.*, at least two-to-one the other way). As noted, the issue addressed should be easier to identify with explicit editorials. Nonetheless, licensees should be given wide discretion in determining which issue or sub-issues were raised which require rejoinder, avoiding potential government intervention on so delicate an editorial matter.

202. Licensees should also do much more on their own initiative to provide time for various community and public interest groups to speak their minds in short spot advertisements or messages. For an example of a successful licensee effort in this regard see W. Hanks & P. Longini, *Television Access: A Pittsburgh Experiment*, 18 J. OF BROADCASTING 289 (1974). Also, the traditional policy of the commercial networks and most licensees to refuse airing of independently produced documentaries deprives the public

casters would be given better guidance about what would be required of them in the editorial situation and be freed from government interference in issue coverage in newscasts, news documentaries, interview shows, roundtable discussions, and other such public issue programming. Broadcasters' journalistic sense of fairness would be relied upon to insure honest coverage in the latter situations. The quality of such coverage would, of course, vary as it does from newspaper to newspaper, or magazine to magazine, but the danger of government or interest group abuse would be greatly diminished. The ASCEF type of complaint and the Nixon and Kennedy variety of utilization of the doctrine would be undermined. The part two disincentive to air controversial news documentaries and other such programming would be eliminated.²⁰³

It must be recognized, however, that the disincentive to air such public issue programming involves much more than part two of the fairness doctrine. The fundamental reason is television's economic incentive to appeal to a mass audience, a common denominator, whose likes and dislikes are measured in Nielson ratings, not in public issue information received. Despite the sizeable minority of people who desire public affairs programming,²⁰⁴ and the critical role that informa-

of potentially interesting investigative journalism, and documentary makers of an outlet for their work. Broadcasters can adequately relieve their concern about the integrity of such independent work by a careful screening out of that which appears unreliable, and a disclaimer aired prior to the documentary. Indeed, the present policy would seem to have adverse antitrust implications for the networks.

203. Licensees would still be subject to sanction anytime during the license period when "substantial extrinsic evidence or documents" which "on their face" reflect "deliberate distortion" of news reporting are submitted to the FCC. 1974 Fairness Report, *supra* note 1, at 26,380, par. 58. Another idea worth considering is Henry Celler's suggestion that although licensees should not be subject to the Commission's judgment or formal complaint proceeding during the term of the license, at license renewal time the licensee should be subject to sanction upon a successful challenge by public interest groups or other parties who show a flagrant pattern of abuse of fairness principles. Thus, a licensee who continually spewed forth one-sided "propaganda" in public affairs programming, violating even a *New York Times v. Sullivan* malice-type protective standard, would be subject to sanction at renewal time. But, "[n]o conscientious broadcaster need fear review with a standard so heavily weighted in his favor." GELLER, *supra* note 91, at 51. Another factor working against a licensee presenting one-sided, biased public issue programming is the economic incentive not to offend an audience. Even parts of audiences opposed to views aired over a station may accept a licensee's broadcasting of those views if the licensee also presents other sides fairly. People are likely to respect a licensee who approaches public issues with integrity and fairness. Continuously one-sided presentations, however, may well result in loss of a significant part of an audience.

204. One survey conducted at the end of 1974 by the Roper Organization indicated that fully 39% of the American people felt television was devoting "too little time" to "having people express their opinion on the air." THE ROPER ORGANIZATION, INC., TRENDS IN PUBLIC ATTITUDES TOWARD TELEVISION AND OTHER MASS MEDIA, 1959-1974 13 (1975). Although perhaps biased by the question's wording and reference to the different roles of television and magazines, only 22% of those surveyed (still a sizeable

tional programming is supposed to play in the American broadcast structure,²⁰⁵ game-shows, situation comedies, and other entertainment programming draw higher Nielson ratings and larger audiences than public issue programming. Higher rates can be charged to advertisers for supporting such programming. Commercial pressures thus act against the airing of public issue broadcasts.²⁰⁶

As noted above, the present part one fairness doctrine approach involves a severe infringement of broadcasters' first amendment rights, has great potential for abuse, lacks guiding criteria for what issues need coverage, and has not resulted in increased public issue coverage.²⁰⁷

A far better way for the Commission to insure public issue coverage is to require that a minimum percentage of public affairs programming be aired.²⁰⁸ The FCC already requires licensees to report to it

minority) indicated that they wanted television to air "more news and public affairs." *Id.* at 19.

205. In its definitive 1949 Editorializing Report, *supra* note 1, the Commission declared that "[i]t is axiomatic that one of the most vital questions of mass communication in a democracy is the development of an informed public opinion through the public dissemination of news and ideas concerning the vital public issues of the day. Basically, it is in recognition of the great contribution which radio can make in the advancement of this purpose that portions of the radio spectrum are allocated to that form of radio communication known as radiobroadcasting. Unquestionably, then, the standard of public interest, convenience and necessity as applied to radiobroadcasting must be interpreted in the light of this basic purpose. It is this right of the public to be informed rather than any right on the part of the Government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone of the American system of broadcasting." *Id.* at 1249, par. 6.

206. For a discussion of the Neilsen rating system see L. BROWN, TELEVISION; THE BUSINESS BEHIND THE BOX 31-35, 177-78, 196-98 (1971). Controversial issue programming may also make audiences hostile to a particular sponsor, causing advertisers to shy away from such programming. See the adverse advertiser reaction to "Guns of August," a CBS documentary, in BROADCASTING, Sept. 15, 1975, at 50. See also the discussion of "Migrant," an NBC documentary in L. BROWN, TELEVISION; THE BUSINESS BEHIND THE BOX 267 (1971). Controversial programming may also interrupt "audience flow," diminishing viewer levels for adjacent entertainment programs. See *id.* at 115-16 for a discussion of audience flow. It should be noted that good public issue programming has occasionally done well in the Nielsen ratings as the success of CBS's "60 Minutes" indicates.

207. In fact, under the double standard for part-one issue coverage, FCC intervention comes when least needed. See *supra* note 159. If issues are "vital," "critical," or "burning," they will have received extensive coverage both on other broadcast stations and in the print media. In fact, such coverage should be invoked in demonstrating the "critical" nature of the issue. If such coverage has taken place, the public has already been heavily exposed to the issue and its surrounding arguments. Coverage by one additional licensee should not make much difference. But it does represent significant government involvement in a licensee's editorial judgments.

208. Public affairs programs are defined by the Commission as follows:

- (d) Public affairs programs (PA) are programs dealing with local, state, regional, national or international issues or problems, including, but not limited to, talks, commentaries, discussions, speeches, editori-

on the news and public affairs programming they have broadcast.²⁰⁹ However, the Commission "has established no minimum amount of time which *must* be devoted to" news and public affairs to insure the granting or renewal of a license.²¹⁰ The FCC has recently indicated that if a television network affiliated renewal applicant proposes less than 5% news and public affairs programming, the Commission staff may not automatically renew the license.²¹¹ This shockingly low indication of what the Commission considers service in the public interest is far below the median percentages of news and public affairs aired

als, political programs, documentaries, mini-documentaries, panels, round-tables, vignettes, and extended coverage (whether live or recorded) of public events or proceedings, such as local council meetings, Congressional hearings, and the like.

Radio Broadcast Services, 47 C.F.R. § 73.112 (Note 1: *Program type definitions* (d)).

News programs are defined as:

(c) News programs (N) include reports dealing with current local, national, and international events, including weather and stock market reports; and when an integral part of a news program, commentary, analysis and sports news. *Id.* at (c).

209. "Each commercial television licensee is required to file by February 1 of each year an Annual Programming Report (F.C.C. Form 303-A . . .) covering a selected composite week during the preceding calendar year and showing the amount of time and percentage of total operating time devoted to various types of local and informational programming during certain time periods. For each program included in the categories of 'public affairs' and 'all others,' the date and time of broadcast, duration and source is submitted. Each year the Commission compiles the statistics submitted by the stations on Form 303-A into an 'Annual Programming Report for Commercial Television Stations' which shows the relative amounts of broadcast time each station devotes to news, public affairs, and other non-entertainment/non-sports programs, along with summaries for each television market and for the nation." Levy letter, *supra* note 139. At renewal time if a television applicant's programming, as reflected in the current Annual Programming Report, varies "substantially" from programming representations made at the previous renewal, the applicant must explain the discrepancy. *See* Broadcast Station License Renewal Application Form, Revision of Form 303, 41 Fed. Reg. 19,536, 19,571 app. D (1976). (F.C.C. form 303-1976, Sect. IV, 8c. [hereinafter cited as License Renewal]). The television applicant must also indicate the minimum amount of time he normally plans to devote to news and public affairs each week. *Id.* at 19,572 (Q.9). Although radio stations are not required to submit Annual Programming Reports, at renewal time they are required to report on past and proposed news and public affairs programming percentages. *See id.* at 19,559 app. C (Q.14), (F.C.C. form 303-R 1976). *See also id.* at 19,556 app. B, pt. IV (Renewal Checklist), pt. IV (Programming).

210. Levy letter, *supra* note 139.

211. Amendment to Section 0.281 of the Commission's Rules: Delegations of Authority to the Chief, Broadcast Bureau, 59 F.C.C.2d 491, 493 (1976). Under the rule, renewal authority is delegated for AM and FM licensee proposals for "less than eight and six percent, respectively, of total non-entertainment programming" and for TV proposals excluding unaffiliated UHF stations for less than "five percent total local programming." *Id.* at 493.

by TV affiliates,²¹² and all the percentage guidelines do is "attempt to make clear the circumstances in which the full Commission, rather than the staff will evaluate the past or proposed program service of a broadcast applicant."²¹³ The guidelines have never resulted in any penalty or inconvenience to a broadcaster other than a few months delay in license approval.²¹⁴ As noted above, numerous broadcasters have had their licenses renewed after having broadcast little or no news and/or public affairs programs.²¹⁵

The current guidelines also fail to require, or even emphasize, the need to broadcast local public affairs programming. The Commission has stressed the importance of broadcasters airing programming that focuses on important local issues.²¹⁶ Indeed, it promulgated the prime time access rule, reserving prime time evening viewing for local programming, in the hopes that stations subject to the rule would "devote a substantial proportion of prime time to programming of particular local significance."²¹⁷

Unfortunately, as recently suggested in a proposal by the National Citizens Committee for Broadcasting [NCCB] "action by the FCC in the matter of television public affairs programming has been little more than words."²¹⁸ The local access periods have all too often not been

212. In an FCC survey the VHF affiliates in the 50 largest markets (grossing over \$5 million, 86 stations) aired a median of 15.5% news and public affairs from sign-on to sign-off. The 50 next largest (under \$5 million, 38 stations) aired a median 13.9%. UHF affiliates aired medians of 11% (over \$1 million, 38 stations) and 10.7% (under \$1 million, 57 stations). Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming From the Comparative Hearing Process (Third Further Notice of Inquiry), 43 F.C.C.2d 1043, 1047 (1973) [hereinafter cited as Third Further Notice of Inquiry]. In the two-year average percentages based on Annual Programming Reports filed with the FCC for 1975 and 1974, 686 commercial television stations reported an average of 9.3% news and 4.5% public affairs programming or a total of 13.8% of informational programming. *Programming by Commercial Television Stations*, TELEVISION BROADCAST PROGRAMMING DATA, 1975, FEDERAL COMMUNICATIONS COMMISSION NEWS, ATTACHMENT, 66002 (June 18, 1976).

213. Levy letter, *supra* note 139.

214. Interview with James J. Brown, Assistant Chief, Renewal and Transfer Division, Broadcast Bureau, FCC (Dec. 24, 1976).

215. See *supra* note 102. See also the range of public affairs median percentages, especially in the prime time periods, in the FCC surveys charted in Third Further Notice of Inquiry, *supra* note 212, at 1045.

216. Editorializing Report, *supra* note 1, at 1247-48, par. 4; Programming Report, *supra* note 197, at 2,314, pars. 29-34; 1974 Fairness Report, *supra* note 1, at 26,376.

217. Consideration of the Operation of, and Possible Changes in, the Prime Time Access Rule, § 73.658(k) of the Commission's Rules (Second Report and Order), 50 F.C.C.2d 829 (1975) [hereinafter cited as Prime Time, Second Report].

218. F. Lloyd & D. Glazer, Public Affairs Programming Proposal 5 (March 1976). (National Citizens Committee for Broadcasting, mimeograph) [hereinafter cited as NCCB Proposal].

used for local or even national public affairs programming, but for syndicated situation comedies, game shows, and the like.²¹⁹ Many stations broadcast very little or no local public affairs.²²⁰ The NCCB proposal that each television station be required to provide at least "one hour per week of regularly scheduled, prime time, *locally-originated*, public affairs programming" merits careful consideration.²²¹

The Commission, in 1971, initiated proceedings to determine percentage guidelines for news and public affairs that would indicate "substantial service" giving television licensees a preference in any comparative renewal hearing.²²² However, the percentages suggested by the Commission, although a significant improvement over its delegation guidelines, were still far too low.²²³ In March, 1977, the Com-

219. See Prime Time, Second Report, *supra* note 217, at 886 app. D; Status Report on Access Entries, BROADCASTING, Dec. 20, 1976 at 43-44 ("The Lawrence Welk Show" and "Hee Haw" are "two biggest hits in prime-access time periods;" "Hollywood Squares" is the winner for "pure access shows," based on Nielsen 22-23 market survey).

220. See Third Further Notice of Inquiry, *supra* note 212, at 1048.

221. The NCCB Proposal includes two other points. In its entirety it reads:

- 1) Each television station must provide at least one hour per week of regularly scheduled, prime time, *locally-originated*, public affairs programming.
- 2) Each of the three major network affiliates must provide one hour per week of regularly scheduled, prime time, national public affairs programming. This hour may be supplied by the network; and
- 3) Each network affiliate not wishing to carry the network offering must provide a second hour of prime time, locally-originated or syndicated, public affairs programming.

NCCB Proposal, *supra* note 218, at 3 (footnote omitted).

222. Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Hearing Process (Notice of Inquiry), 27 F.C.C.2d 580 (1971) [hereinafter cited as Notice of Inquiry]; Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Hearing Process (Further Notice of Inquiry), 31 F.C.C.2d 443 (1971) [hereinafter cited as Further Notice of Inquiry]; Third Further Notice of Inquiry, *supra* note 212. See also *Bills to Amend the Communications Act of 1934 with regard to Renewal of Broadcast Licensees: Hearings before the Subcommittee on Communications and Power of the House Committee on Interstate and Foreign Commerce of the 93d Congress*, 93 Cong., 1st Sess., 1,121-1,124 (1973) (statement of Chairman Dean Burch). The percentage guidelines also include specific percentages for prime time programming. See *infra* note 223.

223. The tentative percentages proposed to reflect "substantial service" were as follows:

- (i) With respect to local programming, a range of 10-15% of the broadcast effort (including 10-15% in the prime time period, 6-11 p.m., when the largest audience is available to watch).
- (ii) The proposed figure for news is 8-10% for the network affiliate, 5% for the independent VHF station (including a figure of 8-10% and 5%, respectively in the prime time period).
- (iii) In the public affairs area, the tentative figure is 3-5%, with as stated, a 3% figure for the 6-11 p.m. time period.

mission brought its inquiry to a close, rejecting the percentage guideline formula.²²⁴ However, the Commission had considered percentage guidelines only in the context of improving the comparative renewal process, and rejected them because it concluded guidelines would not make that process more efficient. It pointed out that they also would be an interference with licensee discretion. The Commission failed to consider the guidelines in conjunction with repealing the far more inhibitory fairness doctrine, and it failed to adequately emphasize the public interest benefit derived from increased public issue coverage. The FCC and the Congress should reconsider a guideline structure as part of a fairness doctrine revision package.²²⁵

Notice of Inquiry, *supra* note 222, at 582.

The median news figures for VHF affiliates in the top 50 markets according to an FCC poll were 10.3% (grossing over \$5 million, 86 stations) and 9.2% (under \$5 million, 38 stations). The median news figures during prime time (6 p.m. to 11 p.m.) were 15% (over \$5 million, 86 stations) and 12.2% (under \$5 million, 38 stations), far in excess of the FCC's "substantial service" figures. The public affairs median figures for the top 50 VHF affiliates were 5.3% (over \$5 million) and 4.7% (under \$5 million). The public affairs median figures during prime time were 6.7% over \$5 million) and 7.2% (under \$5 million), again, far in excess of the Commission's figure. See Third Further Notice of Inquiry, *supra* note 212, at 1045. See also *Citizens Communication Center v. FCC*, 447 F.2d 1201 (D.C. Cir. 1971). In that case the Court held violative of the Communications Act the Commission's policy statement which suggested that a licensee with a record of "substantial" community service would be entitled to renewal despite promises of better performance by a challenger. The stricter policy statement also had provided that a full comparative hearing would be granted a challenger only after the Commission refused to renew an incumbent's license for failure to provide substantial service. The Court stated: "Insubstantial past performance should preclude renewal of a license At the same time superior performance should be a plus of major significance" *Id.* at 1213 (footnote omitted) (emphasis in original). The Court urged that the Commission in its Docket No. 19154 proceeding clarify what constitutes "superior performance." *Id.* at 1213, n.35. In its Further Notice of Inquiry, *supra* note 222, the FCC reacted to the Court's decision. The Commission stated that the percentage guidelines it had originally proposed were indeed suggested as standards to judge superior service, and were not meant to illustrate "minimal service meeting the public interest standard." Rather, meeting of the guidelines percentages would "*prima facie* indicate the type of service warranting a 'plus of major significance' in the comparative hearing . . . the type of service which, if achieved, is of such nature that one can ' . . . reasonably expect renewal.'" Further Notice of Inquiry, *supra* note 222, at 444 (emphasis in original). If the percentage guidelines discussed above are indeed to represent "superior service" then they are far too low. As indicated, the upper limit of many of the guideline ranges fall below present median performances of broadcasters. How can a broadcaster who falls far below the median performance of his fellow licensees be considered a "superior" performer?

224. Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Hearing Process, Docket No. 19154, Report and Order, FCC 77-204, April 7, 1977 (mimeograph).

225. To encourage editorials, and the replies to editorials per the structure discussed in the text, the FCC might slightly inflate the value of editorial-editorial reply time, or time devoted to a similar public access scheme, in calculating a station's compliance with minimum percentage guidelines. Such access time is particularly important in allowing local groups to air their views. The Commission's taking "into account the dif-

Beyond this, the Commission must get tough in enforcing the ascertainment obligations it has imposed on broadcast licensees. As part of these obligations, licensees are required to conduct personal interviews with key community leaders²²⁶ and a random sample survey of the general public²²⁷ to determine the "problems, needs, and interests" in their community.²²⁸ The objective of these ascertainment efforts is to make a licensee's programming more responsive to the local service area.

To determine if licensees are airing programming to reflect the issues discovered in their ascertainment efforts the FCC requires each licensee to place each year in its public inspection file "a list of *no more* than ten significant problems, needs and interests ascertained during the preceding twelve months," and "typical and illustrative programs" which have been aired to meet these problems, needs, and interests, must be documented.²²⁹ These annual lists must be filed with a licensee's renewal application.²³⁰ When a licensee's ascertainment procedures and programming have been woefully inadequate, the Commission has occasionally taken action against a broadcaster.²³¹

ferent revenue posture of stations" in complying with percentage guidelines seems sound. Those stations which make more money from the use of their exclusive frequency should be expected to contribute more. See Notice of Inquiry, *supra* note 222, at 581-82. It should be noted that in light of the far greater number and diversity of radio than TV stations in most markets, the greater availability of radio frequencies for new applicants, the presence of all news and public affairs and phone-in radio stations in many markets, the unique role that radio stations may play in supplying seldom interrupted background or listening music, and the lower revenue intake of most radio as opposed to TV stations, it seems appropriate to require far different standards in the AM-FM radio market than in the VHF market.

226. See Ascertainment of Community Problems by Broadcast Applicants, Primer (First Report and Order), 41 Fed. Reg. 1371, 1381 app. B (1976) [hereinafter cited as Ascertainment Primer]. See also Ascertainment of Community Problems by Noncommercial Educational Broadcast Applicants, 41 Fed. Reg. 12,423 (1976); Primer on Ascertainment of Community Problems by Broadcast Applicants (Report and Order), 27 F.C.C.2d 650 (1971).

227. See Ascertainment Primer, *supra* note 226, at 1382.

228. *Id.* at 1381 (Q.3).

229. *Id.* at 1383 (Q.33). However, programs listed should "not include announcements (such as PSA's) or news inserts of breaking events (the daily or ordinary news coverage of breaking newsworthy events)." *Id.*

230. License Renewal, *supra* note 209, at 19,570. (Form 303, 1976, Sect. IV, No. 3; 19,559, Form 303-R, 1976, Part. IV, No. 13).

231. See, e.g., Vogel-Hendrix Corp., 60 F.C.C.2d 821 (1976); Alabama Educ. Television Comm'n, 50 F.C.C.2d 461 (1975). It should be stressed that public interest groups should continue to play their important role in improving programming during renewal procedures, especially with respect to whether a licensee has aired a minimum percentage of news and public affairs programming as well as programming relating to ascertained needs.

However, the Commission must become far more vigorous in seeing that licensees live up to their ascertainment programming obligations. With the present fairness doctrine responsibility eliminated, ascertainment would take on added significance. As with requiring a minimum percentage of public affairs, the correlation with controversial issues of public importance would not be exact. But the match would be close, and without the adverse fairness doctrine effects.

The Commission must also change its listing requirements so that *at least* ten or even twelve significant problems, needs and interests are enumerated with illustrative programming. The Commission's present wording suggests a maximum of ten, ironically discouraging additional broadcasting in these areas and seemingly suggesting that six, five, or even three broadcasts reflecting community issues is satisfactory licensee service.

As previously noted, the short term solutions discussed above are not perfect. In this complex area, where so many competing interests must be resolved, any scheme will have its drawbacks, and will not afford every group all that it wants. But stripping licensees of present fairness doctrine obligations, requiring a minimum percentage of public affairs programming, enforcing ascertainment requirements, and balancing of broadcast editorials are steps forward. The development of a truly diverse electronic communications system is the ultimate solution to the "unfairness doctrine." Until that system exists, the near term plan suggested above is in the public interest. The federal government would be out of the business of telling licensees what issues to cover and how to cover them. Except in the limited area of editorials, where such questions may be handled more easily, licensees would not have to worry about what total time and frequency ratios are reasonable, what spokesmen have to present, and what formats are acceptable to the federal government. The danger of government abuse would be greatly diminished, and licensee's obligations would be made more clear. The Federal Communications Commission itself would not be placed in the awkward position of constantly trying to second-guess broadcasters' editorial judgments and possibly being used by powerful political or private interests to further their own ends.²³²

232. The FCC's role should be principally confined to renewal time review, except where a station violates editorial reply obligations. It should not have to constantly be engulfed in fairness adjudications. When it does become involved, the guidelines should be clearer and easier to apply. There would, of course, be a certain degree of subjectivity in renewal-time review of whether particular programs were public affairs ori-

At the same time groups seeking access to the media would benefit from much more vigorous and rational enforcement of editorial reply opportunities and public issue programming opportunities. The licensee would still act as editor, but would have many more broadcast pages to fill. The ultimate winner would be the American public which would receive an expanded supply of information about important public issues vital to the health of the Republic.

ented, and whether programming was related to ascertained needs. Licensees should be afforded the discretion to exercise good faith and reason on these questions. However, licensees who substantially vary from percentage guidelines should be easy to pin-point. See the definition of "public affairs" in note 208 *supra*.

